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No. 03-

IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO,
in her individual and official capacity,

Petitioner,

v.

MARIO DIBLASIO, M.D. and MARIO DIBLASIO, M.D., P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the role of the New York State Commissioner of Health in summarily suspending a physician's medical license pending a full hearing is functionally comparable to that of a judge issuing a temporary restraining order, so as to warrant the protection of absolute immunity under this Court's decision in *Butz v. Economou*?

PARTIES TO THE PROCEEDING

Antonia C. Novello, Commissioner of the New York State Department of Health (referred to as the "Commissioner of Health" or "Commissioner"), was one of the defendants-appellees below and is the sole petitioner in this Court. Mario DiBlasio, M.D. and Mario DiBlasio, M.D. P.C., were the plaintiffs below and are the respondents in this Court (referred to collectively as "respondent").

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The opinion of the Court of Appeals, reported at 344 F.3d 292 (2d Cir. 2003), is set forth in Appendix A. The unreported opinion of the district court is set forth in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 2003. On October 2, 2003, petitioner filed a petition for rehearing in the Court of Appeals. The Court of Appeals entered an order denying the petition for rehearing on November 6, 2003 (Appendix C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are New York State Public Health Law §§ 230 and 230-c. The pertinent text of these statutes is set forth in Appendix D.

STATEMENT OF THE CASE

A. Introduction

In *Butz v. Economou*, 438 U.S. 478, 511-13 (1978), this Court held that officials who perform roles in federal administrative proceedings similar to those of judges or prosecutors are entitled to the same absolute immunity from damages suits, in order to ensure that these officials can carry out their responsibilities without the threat of harassment or intimidation by retaliatory litigation for damages.

Following *Butz*, every court of appeals that has been presented with the issue has concluded that state officials performing adjudicatory or prosecutorial roles in medical disciplinary proceedings are protected by absolute immunity. More particularly, several courts of appeals and district courts have held that absolute immunity protects medical board members when they order the summary suspension of a medical license, on the grounds that such action is integral to medical disciplinary proceedings and quasi-judicial in nature, and that a post-suspension adversarial hearing provides sufficient safeguards to deter arbitrary conduct and correct error.

In conflict with these precedents, the Second Circuit held below that the Commissioner of Health's role in issuing a disciplinary order summarily suspending respondent from practicing medicine pending a hearing on charges of serious medical negligence was not functionally equivalent to that of a judge, and consequently that she was not protected by absolute immunity.

A grant of certiorari is appropriate in this case because the ability to summarily suspend a physician is a critical means of safeguarding the public health during the pendency of hearings on charges of serious medical misconduct, and the integrity of the process depends upon the official's ability to act based upon independent judgement, without fear of a subsequent action for damages. Respondent, a radiologist at a clinic servicing thousands of patients, was charged with negligently and incompetently reading mammograms that were of insufficient quality to permit a reliable diagnosis for cancer and then reporting normal results to patients. If the charges were true, and the physician were allowed to continue practicing pending a hearing, his patients would have been

at grave risk of being mis-diagnosed. Denying absolute immunity in such cases may dissuade the Commissioner of Health from issuing such an order in similar circumstances, thereby compromising the compelling public interest in protecting patients from dangerous medical practice.

B. Factual Background

1. Statutory Framework

New York State Public Health Law ("PHL") § 230 sets forth a comprehensive administrative process by which the State Board for Professional Medical Conduct ("State Board") conducts disciplinary proceedings against physicians accused of professional misconduct. State Board members are appointed by the Commissioner of Health or the State Board of Regents for three-year terms, may be removed "at the pleasure of" the Commissioner of Health, and must file constitutional oaths of office. PHL § 230(1-3).

Physician disciplinary proceedings are conducted by State Board committees consisting of two physicians and one lay member appointed by the State Board chairperson. PHL § 230(5-6). Disciplinary proceedings include an investigation phase, PHL § 230(10)(a), and, where appropriate, a hearing phase, PHL § 230(10)(b)-(h). Before an investigation committee of the State Board may be convened, a physician must be given the opportunity to be "interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation." PHL § 230(10)(a)(iii). The physician may have counsel present at this interview. *Id.* If a case referred to an investigation committee involves issues of clinical practice, medical experts shall be consulted by the committee. PHL § 230(10)(a)(ii). A determination that a hearing is warranted

may be made by the Director of the Office of Professional Medical Conduct ("OPMC"), after obtaining the concurrence of a majority of the investigation committee. PHL § 230(10)(a)(iv).

Where a hearing is warranted, the physician is provided a notice of charges, which "shall state the substance of the alleged professional misconduct," PHL § 230(10)(b), as well as a notice of hearing that specifies the time and place of the hearing, the requirement to file an answer to the charges, and the physician's rights at the hearing, PHL § 230(10)(c). A disciplinary hearing then takes place before a State Board hearing committee and an administrative officer. PHL § 230(10)(e).

A critical part of the disciplinary scheme is the authority to issue a summary suspension order. Although the Commissioner of Health generally does not have a role in physician disciplinary proceedings, she alone has the authority in emergency circumstances to issue a summary order against a physician

> after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct, based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section. . . .

PHL § 230(12)(a). Such an order directs the physician "to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service of the order." *Id.*

When the Commissioner of Health issues a summary order, a disciplinary hearing must be commenced within ten days after service of the order, and completed within 90 days after service. *Id.* After hearing from both the OMPC and the physician, the committee must first address whether the OPMC has proven by a preponderance of the evidence that the physician's condition, activity, or practice presents an imminent danger to the public health. It must then promptly make a recommendation to the Commissioner as to whether the summary order should be left in effect, modified, or vacated, and continue the hearing on any remaining charges. *Id.* Within ten days of the hearing committee's recommendation, the Commissioner must determine whether to adopt it, in whole or part, pending final resolution of the case. The hearing committee must then "make every reasonable effort to avoid any delay in completing and determining such proceedings." *Id.* Where there has been no summary order, the last hearing day must take place within 120 days of the first hearing day, although either party may request an extension for good cause. PHL § 230(10)(f).

All disciplinary hearings are recorded stenographically. Physicians are entitled to be represented by counsel, examine all evidence used against them, present fact and expert witnesses and other evidence on their behalf, issue subpoenas for the production of witnesses and evidence, and cross-examine opposing witnesses. PHL § 230(10)(c), (f). The hearing committee must render a decision containing findings of fact and conclusions, specifying any penalty or action to be taken and providing supporting reasons. PHL § 230(10)(g), (h). In order for a charge to be sustained or a penalty imposed, two members of the three member hearing committee must vote for such a determination. PHL § 230(10)(g).

Physicians also have rights of appeal from an adverse decision. They may obtain review by the State Administrative Review Board for Professional Medical Conduct, as well as in a state court proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). PHL § 230-c. A physician may also seek relief pursuant to Article 78 where a hearing committee does not comply with time limitations specified in the statute. PHL § 230(10)(j).

2. Disciplinary Proceeding Instituted Against Respondent

Respondent, a licensed radiologist, was employed by Radiologist Steven Bier, M.D., P.C. ("Bier") as a "spot" or "batch" reader of mammograms, meaning that he interpreted mammograms while having little or no contact with patients. Bier contracted with the Bronx Healthy Women Partnership, a state-funded program, to provide breast cancer screening for its patients who consisted of thousands of mostly underinsured and low-income women. After a Department of Health investigation determined that Bier had a disproportionately low breast cancer detection rate, an expert retained by the Department of Health reviewed a sample of mammograms for which respondent had reported negative results and found that a majority of them were of such poor quality that they could not reliably diagnose cancer. The OPMC then brought disciplinary charges alleging that respondent's medical practices constituted an "imminent danger" to the public health. Based upon those charges and the recommendation of a State Board investigative committee, the Commissioner of Health issued an order on May 25, 2000, summarily suspending respondent's medical license pending a disciplinary hearing, and scheduling a hearing to commence on June 8, 2000. Respondent, through

counsel, agreed to adjourn his hearing and continue his summary suspension until the conclusion of OPMC's case.

On July 26, 2000, a hearing committee of the State Board began to consider whether respondent's summary suspension should be continued until final resolution of the charges. On December 18, 2000, after hearing evidence regarding whether respondent's practices posed an imminent danger to the public health, the hearing committee found that "[t]here is clear evidence in the record demonstrating significant problems with Dr. DiBlasio's interpretations of the mammograms for the specific patients at issue in this case" (App. 31a), but recommended that the suspension be partially lifted to allow respondent to resume radiology practice, other than mammography readings, with supervision. On December 28, 2000, the Commissioner rejected that recommendation and instead continued the full suspension, concluding that respondent's willingness to report normal results based upon deficient mammograms called into question his fitness to practice any form of radiology.

On January 10, 2001, respondent commenced a state court Article 78 proceeding contending that the Commissioner of Health's disregard of the hearing committee's recommendation was arbitrary and capricious, and obtained a temporary restraining order partially lifting his suspension. On January 25, 2001, however, the state court sustained the Commissioner's order to continue the full suspension pending resolution of the disciplinary hearing, and denied respondent's request for an injunction. The next day, the State Board hearing committee issued its final determination which dismissed all charges against respondent.

C. Procedural History

On September 30, 2002, respondent filed the present lawsuit in the United States District Court for the Southern District of New York against the Commissioner of Health and other defendants under 42 U.S.C. § 1983. Respondent alleged, *inter alia*, substantive due process violations arising from his summary suspension, and sought damages totaling approximately $100,000,000. The district court granted defendants' motion to dismiss the amended complaint, holding, in relevant part, that respondent's claims against the Commissioner of Health arising from the summary suspension were barred by absolute immunity (App. 54a-64a).

The court first observed that several courts of appeals had held that the revocation or suspension of a physician's license is a quasi-judicial function, and therefore entitles members of a state medical board who suspend or revoke a license to absolute immunity from suit (App. 55a-56a). It then reviewed the statutory provisions pursuant to which respondent's summary suspension occurred and the safeguards that the statute provides to protect a physician's rights (App. 56a-60a). After assessing New York's physician disciplinary process in light of the factors identified in *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985), and *Butz v. Economou*, 438 U.S. 478, 512 (1978), as relevant to whether a non-judicial adjudicative process is sufficiently similar to a judicial process to warrant absolute immunity, the district court concluded that the Commissioner of Health's function "in the summary suspension process shares enough of the characteristics of the judicial process to afford [her] absolute immunity" (App. 55a, 60a-64a).

The Second Circuit, holding that the Commissioner of Health is not protected by absolute immunity when ordering

the summary suspension of a physician's license, vacated the dismissal of respondent's substantive due process claims against her. The circuit court determined that two of the *Butz* factors weighed in favor of absolute immunity: first, finding New York law unclear on the point, the court assumed arguendo that the Commissioner is not removable at will and is thus insulated from political influence; second, the court acknowledged that the summary suspension of a physician's license "is likely to stimulate 'harassment or intimidation' in the form of a litigious reaction from the disappointed physician, as evidenced by this lawsuit" (App. 11a).

Nonetheless, the court concluded that "summary suspension pursuant to § 230 lacks sufficient similarity to the judicial process to warrant absolute immunity from suit for involved officials" (App. 12a). Evaluating the remaining *Butz* factors, the court first found that § 230 inadequately protects physicians from wrongful deprivation of their licenses. While acknowledging the statutory procedures that protect physicians subjected to summary actions, the Second Circuit found that these protections were undermined by other features of the statute. The court noted that the Commissioner of Health, rather than a State Board committee, has final authority to impose a summary suspension (App. 12a). The court further noted that while a State Board committee must initiate suspension proceedings, the majority of the committee members are appointed by, and may be removed by, the Commissioner (App. 13a). The court was also of the view that the right to a prompt post-deprivation hearing on the imminent danger issue did not adequately protect a physician, "because the commissioner is free to reject the hearing committee's recommendation that the suspension be lifted" (App. 13a).

Second, the Second Circuit found that a wrongful summary suspension was not adequately correctable on appeal (App. 13a). While acknowledging that the hearing required by PHL § 230(10)(f) provides an avenue for review of the charges, the court found this procedure to be insufficient on the basis that "the commissioner is free to ignore the hearing committee's recommendation" (App. 13a).[1] The court, citing *Young v. Selsky*, 41 F.3d 47, 54 (2d Cir. 1994), *cert. denied*, 514 U.S. 1102 (1995), further stated that "in the context of determining whether absolute immunity is appropriate, Article 78 proceedings are generally not considered adequate avenues for 'appeal'" (App. 13a-14a).

The Second Circuit further found that the procedures for the imposition and review of summary suspensions "assign no value to precedent, nor are the procedures adversarial in nature," both of which weigh against absolute immunity (App. 14a). The court concluded that "New York State's procedures governing summary suspensions lack the hallmarks and safeguards of a judicial proceeding that would render absolute immunity for those officials involved appropriate" (App. 14a). In a footnote, the court distinguished the court of appeals cases granting absolute immunity to officials adjudicating medical disciplinary proceedings with the terse statement that "the procedures at issue in those cases

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1. While it is true that the Commissioner may reject a hearing committee's recommendation to lift a summary suspension, the Second Circuit failed to note that the hearing committee ultimately determines, at the conclusion of the hearing, whether the charges have been sustained and what, if any, penalty to impose. The hearing committee's determination is subject to review only by the State Administrative Review Board for Professional Medical Conduct and by a state court pursuant to Article 78.

generally provide physicians much greater protection from erroneous deprivation than New York's procedure regulating summary suspension of medical licenses" (App. 14a n.2).

Finally, the Second Circuit stated that even if the summary suspension procedure significantly shared the characteristics of a judicial proceeding, the Commissioner's role was not sufficiently analogous to that of a judge to entitle her to absolute immunity (App. 15a). The court noted that there was no allegation that the Commissioner issued subpoenas or regulated the course of any hearings, and expressed concern with her involvement in the investigative, prosecutorial, and adjudicatory functions of a summary proceeding. (App. 16a).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Rulings Of This Court And Other Courts of Appeals

In *Butz v. Economou*, this Court held that administrative officials are protected by absolute immunity when performing roles sufficiently analogous to those of judges and prosecutors in court proceedings, in order to ensure that these officials exercise independent judgement "without harassment or intimidation" by the threat of damages liability. 438 U.S. at 512. The Court identified several characteristics of the judicial process which serve as factors to be used in determining whether an administrative proceeding provides sufficient safeguards to justify granting its participants absolute immunity:

> (a) the need to assure that the individual can perform his functions without harassment or

> intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

Applying this analysis, all of the other circuits to have addressed the question have uniformly held that officials are entitled to absolute immunity when adjudicating medical disciplinary proceedings.[2] The Second Circuit, however, denied immunity to the Commissioner of Health in connection with her issuance of a summary suspension. This decision conflicts with (1) decisions by other circuit

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2. *See, e.g., Ostrzenski v. Seigel*, 177 F.3d 245, 249 (4th Cir. 1999) ("[e]very court of appeals that has addressed the issue has concluded that members of a state medical disciplinary board are entitled to absolute quasi-judicial immunity for performing judicial or prosecutorial functions"); *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) ("while the Board Members do not have all of the attributes of a federal hearing officer, they are functionally comparable to judges and prosecutors," and therefore "are entitled to absolute immunity for their quasi-judicial acts"); *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62, 67 (5th Cir. 1997) ("[i]n light of the benefits outweighing the costs of granting absolute immunity as well as the informed decisions of our sister courts, it would be an injustice not to hold the Board members and the Director absolutely immune"); *Wang v. New Hampshire Board of Registration in Medicine*, 55 F.3d 698, 701-03 (1st Cir. 1995) (holding that board members responsible for revocation of physician's license after disciplinary hearing are entitled to absolute immunity).

courts holding that a medical disciplinary proceeding which results in a summary suspension is sufficiently comparable to a judicial proceeding to warrant absolute immunity; (2) decisions by this Court and other circuit courts holding that the availability of administrative and judicial review after a summary action render such an action sufficiently "correctable on appeal" to warrant absolute immunity; and (3) decisions by this Court and other circuit courts holding that absolute immunity does not require a precise correlation between the functions performed by judges and other officials seeking immunity.

A. The Decision Below Conflicts with Rulings by Other Circuit Courts That Summary Action in a Disciplinary Hearing Is Sufficiently Similar to a Judicial Proceeding to Warrant Absolute Immunity

The Second Circuit stands alone in denying absolute immunity to a state official who imposes a summary suspension in a medical disciplinary proceeding. The court criticized the portion of New York's medical disciplinary procedure that allows a summary suspension, on the grounds that the procedure is not sufficiently adversarial, does not sufficiently rely on precedent, and allows the Commissioner to overrule a decision by the hearing committee. The circuit's analysis is in direct conflict with decisions by the Sixth, Eighth and Tenth Circuits, all of which have held that absolute immunity protects officials who take summary action against a medical licensee in a disciplinary proceeding.

In *Watts v. Burkhart*, 978 F.2d 269, 271 (6th Cir. 1992) (en banc), the Sixth Circuit held that absolute immunity barred a federal action against Tennessee medical board

members for allegedly coercing a physician to surrender his license during a summary suspension proceeding. The Sixth Circuit explained that a "[s]ummary suspension is nothing more than a temporary expedient" which is not expected to provide "the full panoply" of procedural safeguards found in the ensuing license revocation hearing." *Id.* at 276. Such an order is judicial in nature because it "is directly comparable to the function performed by a judge in deciding whether to issue a temporary restraining order or preliminary injunction." *Id.* at 277.

Likewise, in *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999), *cert. denied*, 531 U.S. 819 (2000), the Eighth Circuit held that Arkansas veterinary board examiners were protected by absolute immunity for issuing, prior to a hearing, an order to the employers of a veterinarian accused of practicing without a license to "cease and desist" utilizing that practitioner's services. The court found that "to the extent that the board weighed evidence, made factual determinations, determined sanctions, and issued written decisions, we conclude that these duties are functionally comparable to the duties performed by courts." *Id.* at 1010-11.

Similarly, in *Horwitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir.), *cert. denied*, 484 U.S. 964 (1987), the Tenth Circuit held that absolute immunity barred claims against members of the Colorado Board of Medical Examiners who ordered the summary suspension of a physician's medical license, because "all of the steps from the summary suspension through the final decision of the hearing panel constituted the adjudicative scheme found in *Butz* to confer absolute immunity on executive-agency officials." *Id.* at 1513.[3]

3. At least two district courts have also held that absolute immunity protects state officials in connection with their roles in (Cont'd)

In contrast to these decisions, which held that a full adversarial hearing need not precede summary action in order for absolute immunity to be granted, the Second Circuit found that New York's summary suspension procedure is insufficiently adversarial. (App. 14a) Two circuits have rejected exactly this attack on the availability of absolute immunity in summary proceedings. In *Watts*, the Sixth Circuit observed that the respondent had alleged "no fewer than 14 procedural irregularities by which the suspension hearing was supposedly tainted." 978 F.2d at 277. That court nevertheless found absolute immunity applicable because "[m]any of the irregularities — the failure to have an administrative law judge preside, for example — probably reflect the fact that this was a summary suspension proceeding and not a full-scale revocation proceeding." *Id.* Similarly, in *Horwitz*, the Tenth Circuit held that absolute immunity protected the officials who imposed a summary suspension, in part, because the doctor was accorded "prompt and full post-suspension due process." 822 F.2d at 1518.

Moreover, this Court has held that absolute immunity is applicable to even *ex parte* judicial orders. *Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978) ("That there were not two contending litigants did not make [the judge's] act any less judicial."); *Bradley v. Fisher*, 80 U.S. 335, 356-57 (1871) (judge's suspension of attorney without proper notice or hearing "did not make the act any less a judicial act").

Indeed, this Court has "recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process

(Cont'd)
summarily suspending a physician from practice. *See Moran v. Conn. Dept. of Public Health and Addition Servs.*, 954 F. Supp. 484, 490 (D. Conn. 1997), and *Howard v. Miller*, 870 F. Supp. 340, 344-45 (N.D. Ga. 1994).

satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300-301 (1981) ("Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."); *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) ("We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety."); *Barry v. Barchi*, 443 U.S. 55, 65 (1979) ("At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements.").

Moreover, New York's medical disciplinary proceeding in fact provides substantial protections. It requires the concurrence of multiple physicians, including the commissioner of health (herself a highly qualified physician), as well as the consultation of an expert in the particular clinical practice area at issue, before summary action may be taken. *See* PHL §§ 203, 230(10)(a)(ii), 230(12)(a). The physician has the right to explain his position in an interview and present evidence, including expert opinion, before the State Board investigative committee makes its recommendation to the commissioner. *See* PHL § 230(10)(a)(iii). Thus, New York's pre-suspension procedures, if anything, provide more elaborate safeguards than the procedures found in analogous statutes such as the federal Administrative Procedure Act, 5 U.S.C. § 558(c), and the laws of other states, which generally permit summary action to be taken prior to notice and a hearing if the public health is found to be sufficiently endangered.[4]

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4. *See, e.g.*, Ark. Code Ann. § 25-15-211(c); Colo. Rev. Stat. § 24-4-104(4); Conn. Gen. S. § 19a-17(c); Ga. Code Ann. § 50-13-18(c)(1); Tenn. Code Ann. § 4-5-320(d)(1)(B).

The Second Circuit's conclusion that absolute immunity was unavailable because, in its view, New York's summary suspension procedures "assign[ed] no value to precedent" (App. 14a), is also in tension with the holdings of other circuits. *See, e.g.*, *Mishler*, 191 F.3d at 1007 (finding absolute immunity to apply even though "[i]t is unclear from the record to what extent the Nevada Board relies on precedent in making its disciplinary decisions"); *O'Neal*, 113 F.3d at 66 ("while the record is unclear as to whether the board was bound by precedent, we nevertheless feel that this one factor is not controlling and is greatly overshadowed by the convincing nature of the five other variables").[5]

Finally, the Second Circuit's finding that the Commissioner's "ultimate authority" to reject a hearing

5. In any event, New York's medical disciplinary proceedings implicate an extensive body of decisional law, including cases defining negligence and incompetence, *see Bogdan v. New York State Bd. for Professional Medical Conduct*, 606 N.Y.S.2d 381, 382 (App. Div. 1993), *appeal dismissed*, 637 N.E.2d 272 (N.Y. 1994); *Dhabuwala v. New York State Bd. for Professional Medical Conduct*, 651 N.Y.S.2d 249, 252 (App. Div. 1996), which were cited in the hearing committee's final determination in this case. There are also cases that set forth permissible grounds for summary suspensions, which were cited in the Article 78 court decision upholding the Commissioner's determination to continue the full suspension pending the hearing committee's decision. *See Wootan v. Axelrod*, 457 N.E.2d. 743, 746 (N.Y. 1983) (pervasive negligence and/or incompetence threatening public health justifies summary suspension); *John P. v. Axelrod*, 468 N.Y.S.2d 951, 953 (App. Div. 1983) (charges which go to "physician's integrity and competence" to practice justify suspension), *aff'd*, 462 N.E.2d 1192 (N.Y. 1984). That the Commissioner's summary suspension order, based on her finding that respondent's practices posed an imminent danger to the public health, did not cite precedent should not weigh against a finding of absolute immunity.

committee's recommendation against absolute immunity (App. 12a) is likewise in tension with the decisions of other circuits. In many disciplinary systems, a state official or board with final authority to suspend a physician has the discretion to accept or reject the recommendations of experts or other officials, and these ultimate decisionmakers have been held to be protected by absolute immunity. *See, e.g., Horwitz*, 822 F.2d at 1509-10 (absolute immunity protected board members who issued summary suspension based upon opinion of medical expert, and rejected hearing officer's recommendation to reinstate physician's license after a hearing); *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772, 773-74, 784 (1st Cir. 1990) (absolute immunity protected medical board members who made "final decision" based upon "tentative decision" issued by hearing officer). In addition, the Second Circuit's conclusion that the State Board's independence is undermined by the Commissioner of Health's appointment and removal powers is belied by the fact that in the present case, the State Board hearing committee reached a different conclusion regarding the charges against respondent than did the Commissioner, and that decision controlled after the full hearing.

Denying an agency official absolute immunity for taking summary action pending an adversarial hearing is equivalent to denying a judge absolute immunity for issuing a temporary restraining order pending a hearing. These orders are temporary, emergency measures, intended to prevent irreparable harm to the public until adversarial hearings can decide the merits of cases, and are an essential part of the adjudicatory process.

B. The Decision Conflicts with Rulings by this Court and Other Courts of Appeals Holding That, In Exigent Circumstances, A Summary Suspension Is Sufficiently Correctable On Appeal Where a Prompt Post-Suspension Adversarial Hearing and Judicial Review Are Available

The Second Circuit's conclusion that a wrongful summary suspension issued under PHL § 230 is not adequately "correctable on appeal" (App. 13a-14a) also conflicts with decisions of this Court and other circuits, because it fails to give appropriate weight to the availability of a prompt, post-suspension adversarial hearing and an immediate court proceeding in which interim relief may be obtained.

This Court has clearly held that, consistent with due process, "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause." *Barry*, 443 U.S. at 64. While *Barry* involved a challenge to the suspension of a trainer accused of drugging a race horse, the public interest in preventing negligent physicians from harming patients is certainly not less compelling than its interest in fair horse racing. New York's procedures are adequate because they accord a suspended physician an administrative hearing wherein the validity of the charges upon which he is suspended may be "definitely determined," as well as the opportunity to commence a judicial action challenging the suspension.

The disciplinary hearing provided by PHL § 230(10) contains procedural safeguards similar to those that *Butz* deemed sufficiently characteristic of judicial process to confer absolute immunity: an adversarial proceeding; the requirement that

charges must be in writing; the physician's right to be represented by counsel, subpoena witnesses or evidence, present his own evidence, and cross-examine witnesses; the stenographic recording of proceedings; the requirement that an administrative officer, who must be an admitted attorney, rule on all motions and objections and draft the hearing committees conclusions; and the requirement that the hearing committee's determination contain findings of fact and conclusions. *See* PHL § 230(10)(b), (c), (e)-(f); *Butz*, 438 U.S. at 513.[6] Moreover, New York's statute explicitly requires an expedited hearing and resolution of charges when a physician has been summarily suspended. *See* PHL § 230(12)(a). The physician may also bring a state court Article 78 action to dismiss the disciplinary charges if his hearing is unduly delayed. PHL § 230(10)(j).

The Sixth Circuit in *Watts* relied upon similar provisions in Tennessee's statute when it found absolute immunity protected officials taking part in a summary suspension

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6. *Compare Cleavinger*, 474 U.S. at 206:

> Under the Bureau's disciplinary policy in effect at the time of respondents' hearings, few of the procedural safeguards contained in the Administrative Procedure Act under consideration in *Butz* were present. The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

proceeding. *See* 978 F.2d at 276 (stressing that Tennessee's summary suspension procedure mandates that the subsequent license revocation proceedings "be *promptly* instituted and determined") (emphasis in original). The Second Circuit's emphasis in this case upon the fact that respondent's summary suspension lasted approximately eight months (App. 13a) until the hearing committee ultimately dismissed the charges ignored the fact that respondent, by counsel, *stipulated* to adjourn his disciplinary hearing and keep his suspension in place until the hearing was completed.

The Second Circuit's holding that "in the context of determining whether absolute immunity is appropriate, article 78 proceedings are generally not considered adequate avenues for 'appeal'" (App. 13a-14a) is unsupportable. Notably, the Second Circuit has itself held that New York's CPLR Article 78 proceeding constitutes "a wholly adequate post-deprivation hearing for due process purposes." *Locurto v. Safir*, 264 F.3d 154, 175 (2d Cir. 2001). This vehicle provides a suspended physician with the right to an immediate court challenge to a summary suspension. *See Wootan*, 457 N.E.2d at 744; *John P.*, 468 N.Y.S.2d at 952. Moreover, the petitioner may seek a temporary restraining order allowing him to continue to practice, a procedure which respondent in this case employed when he commenced an Article 78 proceeding challenging the continuation of his summary suspension pending a final decision by the hearing committee.

In *Butz*, this Court held that the administrative process and the availability of judicial review are precisely the type of procedural safeguards that support absolute immunity:

> The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the

> proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the proceeding is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. *Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review.*

438 U.S. at 515-16 (emphasis supplied).

Similarly, the Sixth Circuit in *Watts* relied upon the availability of prompt court review in holding that board members were entitled to absolute immunity for taking summary action against a physician in a disciplinary proceeding: "Any danger of improper use of the board's summary powers is further mitigated by Tenn. Code Ann. § 4-5-322(a)(1), which provides that 'preliminary, procedural or intermediate agency action . . . is immediately reviewable [by the Chancery Court] if review of the final agency decision would not provide an adequate remedy.'" *Watts*, 978 F.2d at 276 (alterations in original).[7]

7. The only authority cited by the Second Circuit for its view that an expedited court proceeding under CPLR Article 78 is insufficient to "correct" error on appeal, *Young v. Selsky*, 41 F.3d 47, 54 (2d Cir. 1994), *cert. denied*, 514 U.S. 1102 (1995), misconstrued the relevant inquiry. *Young* found that for purposes of absolute immunity, CPLR Article 78 is an insufficient means to correct "the type of injury" suffered by an inmate who served an improper sentence because it does not provide the remedy of money damages. However, the relevant factor for purposes of the absolute immunity analysis is "the correctability of error on appeal," *Cleavinger*, 474 U.S. at 202; *Butz*, 438 U.S. at 512, not the availability of a damages action.

C. The Decision Below Conflicts with Decisions of this Court and Other Courts of Appeal Granting Absolute Immunity Even Where An Official's Functions Do Not Correspond Precisely to Those of A Judge

The Second Circuit's decision, in holding that the Commissioner of Health's role in ordering a summary suspension is not sufficiently analogous to that of a judge to warrant absolute immunity from suit (App. 15a), also conflicts with decisions of this Court and other circuit courts. The Second Circuit reasoned that the Commissioner's role in summarily suspending a physician was not equivalent to that of a judge because she did not perform *other* functions that a judge would normally perform: "Defendants do not allege that the commissioner issued subpoenas in the instant case, or that she regulated the course of any hearings." (App. 15a-16a).

The appropriate focus of the inquiry, however, is the specific function performed by the Commissioner in this case, and whether that act warrants full immunity, not the nature of her other responsibilities. This Court has repeatedly emphasized that "in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (prosecutor entitled to absolute immunity for preparing application for arrest warrant, but not for executing affidavit) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)).

That the Commissioner bases her determination of whether to order a summary suspension upon the recommendation of State Board committees, rather than

conducting the investigation or hearing herself, does not matter for purposes of the absolute immunity analysis. The dispersal of judicial functions in the context of medical disciplinary proceedings is common, and has not been found to negate the protection of absolute immunity. *See Mishler*, 191 F.3d at 1006 (investigation committee recommends to board whether charges should be pursued but cannot participate in that decision); *Ostrzenski*, 177 F.3d at 251 (hearing officer conducts hearing and refers factual findings to board for disposition); *Bettencourt*, 904 F.2d 773-74 (hearing officer makes all evidentiary and procedural decisions and issues tentative decision to board for final review).

Moreover, the Second Circuit's conclusion that because the Commissioner's authority as agency head "blend[s] the roles of investigator, prosecutor and judge," "§ 230 unduly risks compromising the independence and neutrality of [her] judgment" (App. 16a), cannot be squared with the holdings of this Court and other circuits. In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court observed: "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings." *Id.* at 56. The Court made clear that "[t]his mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." *Id.*

Other circuits have likewise consistently held that the "blending" of functions typically found in an administrative forum does not preclude the granting of absolute immunity. Both the Tenth Circuit in *Horwitz*, 822 F.2d at 1515, and the Eighth Circuit in *Dunham*, 195 F.3d at 1010-11, held that

board members were entitled to absolute immunity even though they performed statutory functions that were investigatory, prosecutorial, and adjudicatory in nature. Likewise, the First Circuit in *Wang* found no legal significance in the fact that the New Hampshire board which suspended plaintiff's license also assumed an "inquisitorial or investigative role," because "State officials performing prosecutorial functions — including their decisions to initiate administrative proceedings aimed at legal sanctions — are entitled to absolute immunity as well." 55 F.3d at 701.

Here, as in *Butz*, the relevant point is that the Commissioner's position does not deprive her of the ability to exercise independent judgement "on the evidence before [her], free from pressures by the parties or other officials within the agency," because she is not "subordinate to executive officials within the agency," nor is she "responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency." *See* 438 U.S. at 513-14 (citing relevant provisions of Administrative Procedure Act).

Thus, the Second Circuit departed from the decisions of the Supreme Court and other courts of appeals which analyze absolute immunity based on the specific function at issue in a case, without requiring that the official's duties correspond precisely to those of a judge. The function of issuing a summary suspension pending a hearing is a judicial act, and the Commissioner has sufficient independence and neutrality to warrant the protection of absolute immunity.

II. The Decision Below Will Seriously Compromise the State's Ability to Take Emergency Action to Protect the Public Health

If the ruling below is permitted to stand, it will significantly undermine the State's ability to safeguard the public during the pendency of disciplinary proceedings addressing medical practices that imminently threaten the public health. Subjecting the Commissioner of Health to the threat of a lawsuit every time she summarily suspends a physician runs the grave risk of allowing these vitally important decisions to be colored by the prospect of retaliatory litigation.

The order of the Commissioner, or any other official charged with the responsibility for issuing a summary suspension, involves the balancing of a temporary deprivation of the physician's ability to practice his livelihood pending a hearing against the need to protect the public from medically negligent conduct that could well deprive patients of their lives. This critical determination is equivalent to the function of a judge in issuing a temporary restraining order, and it requires the same level of protection from civil damages liability accorded to that function.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 18, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2002

(Argued May 2, 2003 Decided Sept. 18, 2003)

Docket No. 02-9298

MARIO DIBLASIO, M.D. and
MARIO DIBLASIO, M.D., P.C.,

Plaintiffs-Appellants,

— v. —

ANTONIA C. NOVELLO, in her individual and official capacity, LISA HAMPTON, in her individual and official capacity, and THE NEW YORK STATE DEPARTMENT OF HEALTH,

Defendants-Appellees.

Before: WALKER, *Chief Judge*, MINER and LEVAL, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the Southern District of New York (William H. Pauley, III, *District Judge*) dismissing plaintiffs' due process claims pursuant to Fed. R. Civ. P. 12(b)(6).

Appendix A

Vacated in part and remanded.

JOHN M. WALKER, JR., *Chief Judge.*

Plaintiffs-Appellants Mario DiBlasio, M.D. and Mario DiBlasio, M.D., P.C. (collectively, "DiBlasio") appeal from a judgment entered by the United States District Court for the Southern District of New York (William H. Pauley, III, *District Judge*), dismissing on the pleadings various substantive and procedural due process claims brought against defendants Antonia C. Novello ("Novello") and Lisa Hampton ("Hampton") in their individual capacities.[1] The district court concluded that both defendants were shielded from DiBlasio's substantive due process claims by absolute immunity and that DiBlasio had failed to state a claim for a "stigma plus" procedural due process violation. We find that DiBlasio's substantive due process claims are not barred by absolute immunity and that the district court erred in dismissing the "stigma plus" claims. Accordingly, we vacate the district court's judgment and remand for further proceedings.

BACKGROUND

In 1998, DiBlasio, a licensed radiologist, was hired by Radiologist Steven Bier, M.D., P.C. ("Bier"). Bier contracted

1. DiBlasio also asserted all of his claims against Novello and Hampton in their official capacities and against the State of New York Department of Health. The district court held that all such claims were barred by the Eleventh Amendment and dismissed them pursuant to Fed. R. Civ. P. 12(b)(1). DiBlasio does not appeal that ruling.

with the Bronx Healthy Women Partnership to provide breast cancer screening services for its patients, who were largely underinsured women. DiBlasio worked as a "batch reader" of mammography films, meaning that he provided clinical interpretations of mammograms and had little or no contact with patients.

In March 2000, the New York State Department of Health ("N.Y. D.O.H." or "the department") launched an investigation of Bier's billing practices. In connection with that investigation, the department reviewed Bier's breast cancer detection rate. After concluding that Bier's detection rate was sufficiently low to warrant further scrutiny, the State Board for Professional Medical Conduct ("the Board") turned its attention to certain radiologists employed by Bier. On March 23, 2000, the Board assigned defendant Hampton, a department fraud investigator and the Director of the Medical Fraud Unit of the Office of Medical Professional Conduct ("OMPC"), to investigate DiBlasio's rate of error in detecting cancer. Following her investigation, Hampton recommended that the department temporarily suspend DiBlasio's physician's licence pursuant to the summary suspension procedures in New York Public Health Law § 230.

In the months leading up to DiBlasio's summary suspension, Hampton met with DiBlasio on two occasions. The first meeting, in April 2000, concerned billing irregularities at Bier P.C. The second meeting, and the one with which we are principally concerned, dealt with DiBlasio's own purported medical misconduct. On May 17, 2000, Hampton phoned DiBlasio to schedule the second

meeting for either May 19 or May 22. DiBlasio chose May 22. On Saturday, May 20, 2000, DiBlasio received a letter from Hampton stating that he was being investigated for professional misconduct and that the May 22 meeting was related to that investigation. The letter made no mention of DiBlasio's right to be represented by counsel and DiBlasio attended the meeting unrepresented.

Three days later, on May 25, 2000, Novello summarily suspended DiBlasio's medical license pursuant to § 230(12)(a) and, through the Board, issued a Statement of Charges, specifying four instances of alleged professional misconduct. On May 31, 2000, Novello issued a press release and posted a statement on the N.Y. D.O.H. website, announcing DiBlasio's suspension and making assertions regarding DiBlasio's incompetence as a radiologist that DiBlasio now alleges were false and defamatory. A month later, on June 30, 2000, the department issued a second press release and a report claiming that DiBlasio's incompetence may have risen to the level of "criminality" and may have resulted in patient deaths.

On July 26, 2000, two months after DiBlasio's summary suspension from medical practice, a hearing committee of the OMPC began to evaluate whether DiBlasio's summary suspension should be continued pending the final resolution of the misconduct charges. Six months later, on December 18, 2000, the Committee announced its finding that no basis existed for the continued complete suspension of DiBlasio's medical license. The Committee suggested that, with the exception of mammography, he be permitted to practice radiology with supervision. Pursuant to her authority under

§ 230(12)(a), Novello rejected the hearing committee's recommendation and ordered the continuation of the complete suspension of DiBlasio's license.

On January 10, 2001, DiBlasio initiated Article 78 proceedings in state court. He claimed that Novello's disregard of the hearing committee's December 18, 2000 recommendation was arbitrary and capricious and sought an injunction barring Novello from enforcing the complete summary suspension of his physician's license. On January 25, 2001, the state court rejected DiBlasio's claim and denied his request for an injunction. However, on the following day, January 26, 2001, the hearing committee determined that the four misconduct charges against DiBlasio were unfounded and ordered the case dismissed pursuant to its authority under § 230(10).

DiBlasio brought this lawsuit in the Southern District of New York on May 25, 2001. He alleged substantive due process claims based on purported misconduct during the investigation and summary suspension proceedings, a procedural due process "stigma plus" claim based on Novello's allegedly defamatory statements, and various violations of New York State law.

On September 30, 2002, the district court dismissed all of DiBlasio's claims. The district court held that all claims brought against the N.Y. D.O.H. and Novello and Hampton in their official capacities were barred by the Eleventh Amendment; and that, with the exception of his "stigma plus" claim, DiBlasio's due process claims against Novello and Hampton in their individual capacities were barred by

absolute immunity. The district court held that the "stigma plus" claim must be dismissed because Novello's statements were "random and unauthorized," and thus the only process due was a post-deprivation name-clearing hearing, which was satisfied by the hearing committee's final determination regarding his suspension and the availability of an Article 78 proceeding. Having dismissed DiBlasio's federal claims, the district court declined to exercise supplemental jurisdiction over his state claims and dismissed those as well.

DiBlasio filed a timely notice of appeal, challenging only the dismissal of his federal claims against Novello and Hampton in their individual capacities. DiBlasio does not appeal the dismissal of his complaint against the N.Y. D.O.H. or Novello and Hampton in their official capacities.

DISCUSSION

I. *Rooker-Feldman*

Defendants argue, at the outset, that the *Rooker-Feldman* doctrine deprived the district court of jurisdiction over DiBlasio's "as applied" due process claims because "the essential allegations" underlying that claim "were actually and necessarily decided in their prior Article 78 proceeding." *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). We agree with the district court that the *Rooker-Feldman* doctrine does not apply to this case.

Appendix A

We have observed that the scope of the *Rooker-Feldman* doctrine is at least as broad as the doctrines of claim and issue preclusion. *See Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 195, 199 (2d Cir. 1996). However, because "claim preclusion generally does not operate to bar a § 1983 suit following the resolution of an Article 78 proceeding," *Colon v. Coughlin*, 58 F.3d 865, 870 n.3 (2d Cir. 1995), the defendants must rely on issue preclusion to support their *Rooker-Feldman* argument. "Under New York law, the doctrine of issue preclusion only applies if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Id.* at 869 (footnote omitted).

The only issue decided in DiBlasio's Article 78 proceeding was whether, under the standards applicable to a preliminary injunction, DiBlasio demonstrated that Novello's decision to override the hearing committee's recommendation to modify the summary suspension was "arbitrary and capricious" pursuant to N.Y. C.P.L.R. 7803(3). Thus, although DiBlasio's Article 78 claim was based on many of the same facts underlying his federal constitutional claims, the claims are not comparable. Deciding the federal claims in DiBlasio's favor would not necessarily contradict the Article 78 court's determination that Novello's decision was not "arbitrary and capricious." Accordingly, we conclude the district court correctly held that DiBlasio's due process claims were not barred under *Rooker-Feldman*.

Appendix A

II. *Absolute Immunity*

We next consider whether the district court erred in dismissing DiBlasio's substantive due process claim on the basis that Novello and Hampton had absolute immunity from suit. We find that the extension of absolute immunity to Novello and Hampton was improper and, accordingly, vacate the district court's order to the extent that it relied on a finding of absolute immunity and remand for further proceedings.

Courts have recognized two forms of immunity: absolute and qualified. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and hence courts are generally "quite sparing" in their recognition of absolute immunity. *Burns v. Reed,* 500 U.S. 478, 486- 87 (1991) (citations omitted). Absolute immunity is accorded to judges and prosecutors functioning in their official capacities and, under certain circumstances, is also extended to officials of government agencies "performing certain functions analogous to those of a prosecutor" or a judge. *Butz v. Economou,* 438 U.S. 478, 515 (1978). In considering whether the procedures used by the agency are sufficiently similar to judicial process to warrant a grant of absolute immunity, we employ a "functional approach," *Cleavinger v. Saxner,* 474 U.S. 193, 201-02 (1985) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 810 (1982)), and look to whether the actions taken by the official are "functionally comparable" to that of a judge or a prosecutor, *Butz,* 438 U.S. at 513; *see also Imbler v. Pachtman,* 424 U.S. 409, 423 n.20 (1976); *Young v. Selsky,* 41 F.3d 47, 51 (2d Cir. 1994). Government actors who seek

absolute immunity "bear the burden of showing that public policy requires an exemption of that scope." *Butz*, 438 U.S. at 506. However, once a court determines that an official was functioning in a core judicial or prosecutorial capacity, absolute immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger*, 474 U.S. at 199-200 (internal quotations and citations omitted).

Whether the officials here functioned in a judicial or prosecutorial capacity requires us to briefly review the operation of New York Public Health Law § 230(10) and § 230(12)(a). Section 230 creates the OMPC, governs disciplinary proceedings concerning physicians suspected of misconduct, and establishes the conditions under which physicians' licenses can be suspended temporarily or permanently. *See* N.Y. Pub. Health Law § 230(10) & (12). Section 230 also governs the procedures the department must follow if it summarily suspends a physician's license prior to conducting a full investigation and hearing. *See* § 230(12)(a).

Section 230(12)(a) authorizes the commissioner of the N.Y. D.O.H. to summarily suspend a license if, "after an investigation and a recommendation by [an investigative committee of the Board], based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger . . . and that it therefore appears to be prejudicial . . . to delay action until an opportunity for a hearing can be provided." § 230(12)(a). Before summarily suspending a physician's license, the Board must also conduct

an interview of the physician. *See* § 230(10)(a)(iii). After a summary order issues, the Board, through a hearing committee, must commence hearing proceedings within ten days, "provided . . . that the hearing shall be completed within ninety days," § 230(12)(a), and in these proceedings the committee must "first determine whether by a preponderance of the evidence, the licencee is . . . engaging in a . . . activity which constitutes an imminent danger to the health of the people," *id.* The commissioner has authority to adopt the hearing committee's recommendation or to leave the summary order in effect pending final resolution of the case. *See* § 230(12)(a). Section 230(12)(a) specifies that summary orders "shall be public upon issuance." § 230(12)(a).

In determining whether officials acting pursuant to § 230 should be granted absolute immunity we consider whether § 230's procedures governing summary suspension of physicians' licenses share enough of the "characteristics of the judicial process," and whether the officials themselves were functioning in a manner sufficiently analogous to a judge or prosecutor. *See Butz*, 438 U.S. at 513 (quotation marks and citations omitted). In evaluating the process itself, we assess the six factors outlined in *Butz*, that are "characteristic[] of the judicial process":

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature

> of the process; and (f) the correctability of error on appeal.

Cleavinger, 474 U.S. at 202 (citing *Butz*, 438 U.S. at 512.

In this case, two *Butz* factors weigh in favor of absolute immunity. With respect to whether the commissioner is insulated from political influence, DiBlasio contends that the commissioner of health "serves at the will of the Governor," and hence is subject to the fluctuations of political forces. Were this the case, we agree that it would be improper to characterize the commissioner as insulated from political influence. However, DiBlasio has provided no evidence that the commissioner is, in fact, subject to at will removal, and New York law is not clear on this point. *Compare* N.Y. Pub. Health Law § 204(1) ("[t]he commissioner shall be appointed by the governor, by and with the advice and consent of the senate and shall hold office until the end of the term [of that governor] . . .") *with* N.Y. Const., art. 5, § 4 (department heads "shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner prescribed by law"). For purposes of this appeal, we will assume that the commissioner is not removable at will and that such insulation from political influence weighs in favor of a grant of absolute immunity under *Butz*. Additionally, we do not doubt that suspension of a physician's license pursuant to § 230's summary procedures is likely to stimulate "harassment or intimidation" in the form of a litigious reaction from the disappointed physician, as evidenced by this lawsuit. Although these considerations are important, assessment of the remaining *Butz* factors

convinces us that summary suspension pursuant to § 230 lacks sufficient similarity to the judicial process to warrant absolute immunity from suit for involved officials.

First, we find that § 230 inadequately protects physicians from wrongful deprivation of their professional licenses, the second *Butz* factor. Defendants emphasize those aspects of § 230 that serve to limit the N.Y. D.O.H.'s discretion in summary proceedings. For example, prior to summarily suspending a physician's license, the hearing committee must investigate the allegations of misconduct and make a recommendation regarding whether charges should be brought. *See* N.Y. Pub. Health Law § 230(12)(a). Hence, as the district court observed, the party seeking the summary suspension "is not part of the Commissioner's own staff [and its members] are appointed by either the Commissioner or the Board of Regents for terms of three years." In addition, the Board must conduct a pre-suspension interview with the physician, at which the physician may have counsel present and may submit written comments or expert opinion. *See id.* at § 230(10)(a)(iii). Finally, § 230 requires that the Board commence a hearing within ten days of the summary suspension, thus providing prompt post-deprivation review. *See* § 230(12)(a).

Although these procedures provide some protection to physicians subjected to summary suspension proceedings, the efficacy of those procedures are seriously diminished by other features of § 230. First, by the terms of § 230, the Board's hearing committee has the power to suggest a course of action only, while the commissioner has the final authority to summarily suspend a physician's license. *See* § 230(12)(a).

Second, although the hearing committee must initiate suspension proceedings, the independence of that body is severely undermined by the commissioner's appointment and removal powers: eighty percent of the Board members and, derivatively, we can assume that approximately eighty percent of those on the hearing committee, are appointed by the commissioner herself, *see* § 230(1), and can be removed at the commissioner's "pleasure," *see id.* at § 230(3). Third, the post- deprivation hearing before the Board's hearing committee provides no real check on the commissioner's conduct because, under the statute, and as happened here, the commissioner is free to reject the hearing committee's recommendation that the suspension be lifted. In short, under § 230 the commissioner has virtually unfettered authority to determine whether a physician's license should be summarily suspended pending resolution of misconduct charges—a process that, in this case, took eight months. The absence of meaningful safeguards against arbitrary executive action in a summary suspension proceeding weigh against extending absolute immunity to Novello and Hampton.

Butz also requires us to consider whether a wrongful summary suspension is "correctabl[e] on appeal." *Butz*, 438 U.S. at 512. The district court reasoned that the hearing required by § 230(10)(f) and the availability of an Article 78 proceeding provide prompt review of a summary suspension, hence weighing in favor of absolute immunity. In the context of determining whether absolute immunity is appropriate, the hearing available under § 230, while providing an avenue for review of the charges themselves, provides no meaningful review of the summary suspension because, as happened here, the commissioner is free to ignore the hearing committee's recommendation. In addition, in the context of determining

whether absolute immunity is appropriate, Article 78 proceedings are generally not considered adequate avenues for "appeal." *See Young*, 41 F.3d at 54.

Finally, we also observe that § 230's procedures for the imposition and review of summary suspensions assign no value to precedent, nor are the procedures adversarial in nature—both of which weigh against absolute immunity under *Butz*. *See* 438 U.S. at 512. The defendants dispute the second point, and argue that the obligatory pre-suspension interview is an adversarial proceeding. We are unconvinced: Even though physicians are permitted to have an attorney present at the interview, and are allowed to present countervailing evidence, the interviews lack key elements of an adversarial proceeding, such as a neutral decision maker and evidentiary rules. *Cf. Young*, 41 F.3d at 53-54. In sum, New York State's procedures governing summary suspensions lack the hallmarks and safeguards of a judicial proceeding that would render absolute immunity for those officials involved appropriate.[2]

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2. Although several circuits have found that medical board examiners have judicial immunity from suits brought against them for their conduct in license suspension proceedings, *see, e.g., Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999); *Ostrzenski v. Seigel*, 177 F.3d 245 (4th Cir. 1999); *O'Neal v. Miss. Bd. Of Nursing*, 113 F.3d 62 (5th Cir. 1997); *Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698 (1st Cir. 1995); *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 1992) (en banc); *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772 (1st Cir. 1990); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508 (10th Cir.1987), the defendants' heavy reliance on these cases is misplaced. Medical license suspension procedures vary, and the procedures at issue in those cases generally provide physicians much greater protection from erroneous deprivation than New York's procedure regulating summary suspension of medical licenses.

Moreover, we find that, even if the summary process itself shared more characteristics with a judicial proceeding, neither Novello's nor Hampton's role in the summary suspension was sufficiently analogous to that of a judge or prosecutor, respectively, to warrant absolute immunity from suit. Novello should be accorded absolute immunity only if her role in the summary suspension proceeding is "functionally comparable to that of a judge." *Butz,* 438 U.S. at 513 (internal quotation marks and citations omitted). In *Butz,* the Court paid close attention to the role of an administrative law judge ("ALJ") under the Administrative Procedure Act ("APA"), and specifically asked whether the ALJ's function and authority is sufficiently similar to that of a judge. Does the official have authority to issue subpoenas, make evidentiary rulings, regulate the course of the hearing, and make or recommend decisions? More importantly, does she exercise judgment "free from pressures by the parties or other officials within the agency"? *Butz,* 438 U.S. at 513-14 In concluding that the ALJ's function was similar to that of a judge, the *Butz* Court distinguished the pre-APA system, under which "there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, and because they were often subordinate to executive officials within the agency." *Id.* at 513-14 (citations omitted).

In this case, although the commissioner of the N.Y. D.O.H. has the ultimate authority to summarily suspend a physician's license, her functions otherwise do not resemble that of a judge. Defendants do not allege that the

commissioner issued subpoenas in the instant case, or that she regulated the course of any hearings. As importantly, as agency head she appears to wear several hats in the course of a summary proceeding: overseer of the investigation, initiator of charges and summary proceedings, and final arbiter of the decision to impose and sustain the summary suspension of a physician's license. By blending the roles of investigator, prosecutor, and judge, § 230 unduly risks compromising the independence and neutrality of the commissioner's judgment, and abrogating the checking function achieved in the judicial system by separating investigative, prosecutorial, and judicial staffs. *Cf. Young,* 41 F.3d at 53 (lack of insulation of Director of Special Housing and Inmate Disciplinary Programs from communication with hearing officers about a specific case significant factor in finding that absolute immunity does not attach).

Similarly, Hampton's role in the summary suspension process lacks sufficient resemblance to that of a prosecutor to warrant absolute immunity. The key to whether a prosecutor should be afforded absolute immunity is the degree to which the specific conduct at issue is "intimately associated with the judicial phase of the criminal process." *Imbler,* 424 U.S. at 430; *Burns,* 500 U.S. at 486. In assessing whether absolute immunity should attach to a prosecutor, or an agency official claiming prosecutorial immunity, we have focused on the timing of the conduct at issue, drawing a distinction between the investigative and prosecutorial functions, *see Buckley,* 509 U.S. at 274 ("A prosecutor . . . is [not] an advocate before he has probable cause to have anyone arrested."); *Hill v. City of New York,* 45 F.3d 653, 661

(2d Cir. 1995) ("Before any formal legal proceeding has begun and before there is probable cause to arrest, . . . a prosecutor receives only qualified immunity for his acts.") (citations omitted), and the authority of the individual claiming immunity to make the decision to initiate a prosecution, *see Scotto v. Almenas*, 143 F.3d 105, 112 (2d Cir. 1998) (where parole officer had no statutory authority to initiate parole revocation procedure, but could only recommend such action be taken by his superior, he is not acting in a prosecutorial function).

Defendants argue that the district court properly categorized Hampton's function as "prosecutorial" because DiBlasio's "allegations focused [on Hampton's] function[ ] in initiating the proceeding and assembling the evidence upon which plaintiffs were suspended." We disagree. Defendants have provided insufficient evidence to support a conclusion that Hampton performed her investigation before the OMPC decided to summarily suspend DiBlasio's license, and thus that her function can be analogized to the role of a prosecutor preparing for a grand jury or a trial. *Cf. Buckley*, 509 U.S. at 273 (to qualify for absolute immunity, a prosecutor's investigative activities 'must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury *after* a decision to seek an indictment has been made") (emphasis added).

Moreover, even if Hampton's investigation occurred before the OMPC decided to initiate suspension proceedings, she would not be eligible for prosecutorial immunity because, as discussed above, § 230's summary procedures are not

judicial in nature. Prosecutors are granted absolute immunity only for those functions that are "intimately associated with the judicial phase of the criminal process," *Imbler,* 424 U.S. at 430, in part because absolute immunity is designed to "free[ ] the judicial process of the harassment or intimidation" associated with collateral litigation, *Forrester v. White,* 484 U.S. 219, 226 (1988). Because summary suspension proceedings conducted pursuant to § 230 are not judicial in nature, Hampton's investigative work was not "intimately associated" with a judicial proceeding.

Finally, Hampton, as an investigator, lacked the authority to initiate charges against a physician, *see* N.Y. Pub. Health Law § 230(10)(a)(iv) (after an investigation is conducted and after the director of the OMPC obtains the concurrence of a majority of an investigation committee, consults with the executive secretary, and "determines that a hearing is warranted[,] the *director shall* . . . direct counsel to prepare the charges") (emphasis added), and had no authority to trigger summary proceedings, *see* § 230(12)(a) (commissioner has authority to summarily suspend physician's license "after an investigation and a *recommendation by a committee on professional conduct*") (emphasis added). Thus, the statutory limitations on Hampton's authority counsel against granting her prosecutorial immunity.

In light of the fact that the summary procedures provided in § 230 are insufficiently similar to a judicial proceeding to warrant absolute immunity, and that neither Novello's nor Hampton's role in the summary suspension was "functionally comparable" to that of a judge or prosecutor, we conclude the district court erred in granting them absolute immunity.

Appendix A

III. *Stigma Plus*

DiBlasio's complaint alleges that Novello's statements to the press on May 31, 2000 and June 30, 2000 are actionable as a component of a "stigma plus" violation. "Stigma plus" refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some "tangible interest" or property right (the plus), without adequate process. *See Paul v. Davis,* 424 U.S. 693, 701-02, 711-12 (1976); *Neu v. Corcoran,* 869 F.2d 662, 667 (2d Cir. 1989). Although it is clear that defamation "plus" loss of government employment satisfies the *Paul* "plus factor," we have also observed that, outside that context, "it is not entirely clear what the 'plus' is." *Neu,* 869 F.2d at 667. For purposes of this appeal, we need not consider this issue because, in the proceedings before the district court, defendants apparently conceded that Novello's allegedly defamatory statements to the press deprived DiBlasio of his "tangible interest" in the practice of medicine, but argued that DiBlasio's post-deprivation hearing satisfied due process requirements.

The district court agreed, determining that Novello's allegedly defamatory statements were "random and unauthorized," and hence that only a post-deprivation hearing was required. The court further found that the Article 78 proceeding and the hearing committee's proceedings provided adequate post-deprivation name-clearing hearings. *See Hellenic Am. Neighborhood Action Comm. v. City of New York,* 101 F.3d 877, 880 (2d Cir. 1996). On that basis, the court dismissed DiBlasio's "stigma plus" claim. We conclude that the district court erred in finding that the conduct of a high-ranking official such as Novello was

"random and unauthorized" and accordingly remand for further proceedings.

Generally, due process requires that a state afford persons "some kind of hearing" prior to depriving them of a liberty or property interest. *See Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 299 (1981). However, due process does not require the impossible. *See Zinermon v. Burch,* 494 U.S. 113, 128-29 (1990). Where a deprivation at the hands of a government actor is "random and unauthorized," hence rendering it impossible for the government to provide a pre-deprivation hearing, due process requires only a post-deprivation proceeding. *See Parratt v. Taylor,* 451 U.S. 527, 541 (1981) (loss of a prisoner's mail-order product was a negligent, random, and unauthorized act by a prison employee, and hence a post-deprivation tort suit was sufficient to satisfy due process); *see also Hudson v. Palmer,* 468 U.S. 517, 534 (1984) (only post-deprivation remedy is required following intentional destruction of an inmate's personal property by a prison guard, because the state was not "in a position to provide for predeprivation process").

We have determined, however, that the "random and unauthorized" exception to the requirement of a pre-deprivation hearing does not apply where the government actor in question is a high-ranking official with "final authority over significant matters." *Burtnieks v. City of New York,* 716 F.2d 982, 988 (2d Cir. 1983); *see also Dwyer v. Regan,* 777 F.2d at 832 (2d Cir. 1985). In *Dwyer,* we explicitly distinguished *Hudson* and *Parratt* as involving "lower-echelon state employees," *Dwyer,* 777 F.2d at 832, and in

Burtnieks reasoned that categorizing acts of high-level officials as "random and unauthorized" makes little sense because the state acts through its high-level officials, *see Burtnieks*, 716 F.2d at 988.

Relying on *Dwyer* and *Burtnieks*, DiBlasio argues that the district court erred in finding that the "random and unauthorized" exception applied to Novello's various purportedly defamatory statements. We agree. The commissioner of the N.Y. D.O.H. is a high-level state official with final authority on many department matters, including the content of press releases and her own statements in press conferences. Moreover, pursuant to § 230(12)(a), summary suspensions are public upon issuance. Under such circumstances, it would make little sense to characterize her public statements as "random and unauthorized."

Defendants argue that, to the extent that Novello's statements were false and malicious, she clearly exceeded her authority and, at least to that extent, her statements were random and unauthorized because such statements violated state law. This argument is unpersuasive because defendants misconstrue the meaning of "unauthorized" as that term is used in *Parratt* and *Hudson*. In *Zinermon*, the Supreme Court clarified the meaning of "unauthorized," explaining that where a state "delegate[s] to [the defendants] the power and authority to effect the very deprivation complained of[,] and also delegate[s] to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful [deprivation]," abuse of that authority is not considered "random and unauthorized" as that phrase is used in *Parratt* and *Hudson*. *Zinermon*, 494 U.S. at 138.

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In response to the dissenters' suggestion that "departures from otherwise unimpugned and established state procedures" are necessarily "unauthorized," *id.* at 141 (O'Connor, J., dissenting), the *Zinermon* majority further explained that "*Parratt* and *Hudson* . . . do not stand for the proposition that in every case where a deprivation is caused by an 'unauthorized departure . . . from established practices, . . . state officials can escape § 1983 liability simply because the State provides [a post- deprivation review in the form of a] tort remed[y].' " *Id.* at 138 n.20.

In the instant case, Novello had the authority to summarily suspend DiBlasio's license, and had the duty as commissioner to ensure that the department followed the prescribed procedures governing summary suspensions. Accordingly, any abuse of that authority that rose to the level of a due process violation cannot be considered "random and unauthorized." The fact that some of her statements were defamatory or otherwise in violation of state law does not, under the circumstances here, render them "unauthorized," as that term is understood in the applicable case law.

To the extent that defendants argue that our holding in *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities* supports a contrary view, they are mistaken. *See* 64 F.3d 810 (2d Cir. 1995). In *Komlosi*, the plaintiff waived his right to a "name-clearing hearing"—an arbitration that would have been held *prior* to the publication of the defamatory statements. *Id.* at 818. Hence, the *Komlosi* court did not even consider the issue of whether

a post-deprivation name-clearing hearing was sufficient. *See id.*[3]

Finally, defendants argue that, quite aside from whether Novello's statements were random and unauthorized, the post-deprivation procedures available in this case were adequate because of the emergency nature of the situation and the need to inform the public of purported dangers posed by DiBlasio's practice of radiology. We do not take issue with the proposition that, under certain emergency circumstances, a post-deprivation hearing is all that is required to satisfy due process. *See, e.g., Hodel,* 452 U.S. at 299- 300 & 303 (where statute authorizes Secretary of Interior to order cessation of mining operation upon discovery of immediate danger, provision for a post-deprivation hearing within five days satisfies due process). However, the issue of whether DiBlasio's alleged misconduct was or was not an emergency, and the necessity of calling the public's attention to DiBlasio's summary suspension in order to address that purported emergency, involves a disputed issue of fact that

3. Defendants also rely on *Hellenic,* 101 F.3d 877, for the proposition that the random and unauthorized exception set forth in *Parratt* and *Hudson* applies in the instant case. Such reliance is misplaced. In *Hellenic,* a city contractor was effectively blacklisted from city procurements by directives issued by the director of the Mayor's office of contracts and the City's chief procurement officer. *See* 101 F.3d at 879. We found that such conduct was "random and unauthorized," and that therefore the availability of a post deprivation hearing satisfied due process requirements. We did not find that the contracts officer had "final authority over significant matters," *Burtnieks,* 716 F.2d at 988, nor is there any indication that the parties in that case raised the issue of the contract or procurement officers' final authority.

is inappropriate to consider in the context of a Rule 12(b)(6) motion. *See Burtnieks*, 716 F.2d at 988 ("Under *Parratt*, before reaching the question of the adequacy of the state remedies, a court must first find the necessity of quick action [due to an emergency] or the impracticality of providing any predeprivation process.") (internal quotation marks omitted). Even if a proper exercise of caution justified an immediate pre-hearing suspension of DiBlasio, so as to protect the public, it is more difficult to justify the pre-hearing issuance of a press release containing stigmatizing statements about him. DiBlasio was a spot reader and had no contact with patients. Because of his anonymity among patients, notifying the public of his suspension would serve little purpose: Women whose mammograms he read in the past would not know to be re-screened and, in the unlikely event that DiBlasio were to attempt to practice during the suspension period, women seeking screening would not know to find a different radiologist to read their mammograms.

For the foregoing reasons, we conclude that the district court erred in finding that Novello's conduct was "random and unauthorized," and hence erred in dismissing DiBlasio's claim alleging a "stigma plus" due process violation on that basis.

Because the district court dismissed all of DiBlasio's § 1983 claims, it declined to exercise supplemental jurisdiction over his state law claims. As we have reinstated DiBlasio's § 1983 claims against Novello and Hampton in their individual capacities, we also reinstate DiBlasio's state law claims.

Appendix A

CONCLUSION

For the foregoing reasons, we VACATE the district court's dismissal of DiBlasio's claims against Novello and Hampton in their individual capacities, VACATE the dismissal of DiBlasio's state law claims, and REMAND for further proceedings. Costs to plaintiffs.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 4498 (WHP)

MARIO DIBLASIO, M.D. and
MARIO DIBLASIO, M.D., P.C.

Plaintiffs,

-against-

ANTONIA C. NOVELLO, in her individual and official capacities, LISA HAMPTON in her individual and official capacities, and the NEW YORK STATE DEPARTMENT OF HEALTH,

Defendants.

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs Mario DiBlasio, M.D. and Mario DiBlasio, M.D., P.C. (collectively "DiBlasio" or "plaintiffs") bring this action against Antonia C. Novello, the Commissioner of the New York State Department of Health, in her individual and official capacities, Lisa Hampton, the Director of the Medical Fraud Unit of the Office of Professional Medical Conduct,

in her individual and official capacities, and the New York State Department of Health alleging civil rights claims, defamation claims and other state tort claims arising from the summary suspension of DiBlasio's medical license. Defendants move to dismiss this action pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. For the reasons described below, defendants' motion to dismiss is granted.

Background

In 1982, DiBlasio, a doctor licensed to practice medicine in the State of New York, became a "Board Certified" radiologist. (Amended Complaint ("Am. Compl.") ¶ 8.) In June 1988, DiBlasio was a part-time radiologist at Steven Bier, M.D., P.C. ("Bier P.C."). Bier P.C. contracted with the Bronx Healthy Women Partnership ("Partnership")—a state program to assist underinsured women and women of limited income with the detection of breast cancer through a cancer screening program—to provide services to patients of the Partnership, including self-breast exam education, clinical breast examinations and baseline mammograms. (Am. Compl. ¶¶ 9.12-13.)

At Bier P.C., DiBlasio read radiology films taken by State licensed technicians and reported his conclusions and diagnoses. (Am. Compl. ¶ 22.) This practice was commonly known as "spot" or "batch" reading. (Am. Compl. ¶ 22.) Bier P.C.'s patients' had little or no contact with DiBlasio. (Am. Compl. ¶ 24.) Bier P.C. did not display DiBlasio's name on its front door nor did DiBlasio participate in Bier P.C.'s clinical breast examinations, self-breast examination

education, billing practices or its quality assurance program. (Am. Compl. ¶¶ 23-24.) As a result, Bier P.C. patients did not know that DiBlasio worked at Bier P.C. (Am. Compl. ¶ 24.)

Defendant Dr. Antonia C. Novello ("Novello") is the Commissioner of defendant New York State Department of Health ("DOH"). (Am. Compl. ¶ 6.) Novello's duties as Commissioner involve public policy and are administrative, political, and investigative in nature, not adjudicative or judicial in nature. (Am. Compl. ¶ 6.) Defendant Lisa Hampton ("Hampton") is the Director of the Medical Fraud Unit of the Office of Professional Medical Conduct ("OPMC") for the DOH. (Am. Compl. ¶ 7.) Hampton's duties as Director are primarily investigative and administrative in nature. (Am. Compl. ¶ 7.)

On March 23, 2000, the Cancer Screening Surveillance and Evaluation unit ("CSSE") of the Bureau of Chronic Disease, Epidemiology and Surveillance, a DOH division, met to discuss allegations of low cancer detection rates and fraudulent billing for medical services by Bier P.C. (Am. Compl.¶ 16.) Hampton and other employees of the DOH and OPMC attended this meeting. (Am. Compl.¶ 17.)

The CSSE discussed a Five Year Statistical Study ("Study") of Bier P.C.'s rate of detection of breast cancer in comparison to other programs in the Partnership as well as the statewide average (Am. Compl. ¶¶ 18-19.) As part of this Study, DOH interviewed a small sampling of Bier P.C.'s patients and examined results of Bier P.C.'s medical services, which included mammography readings performed by seven

different radiologists including DiBlasio. (Am. Compl. ¶ 20, 28.) The DOH's statistical analysis concluded that the breast cancer detection rate at Bier P.C. was significantly lower than the rate for the statewide population and other Partnership programs. (Am. Compl. ¶ 27.)

As a result of the DOH's conclusions, from March 23 through March 29, representatives of the OPMC reviewed medical records of several Bier P.C. patients as part of an investigation of DiBlasio (Am. Compl. ¶ 30.) That sampling formed the principal basis of the summary proceedings taken against DiBlasio. (Am. Compl. ¶ 32.) DiBlasio alleges that Hampton's review of these medical records was neither random nor scientific, and thereby compromised the integrity of the investigation. (Am. Compl. ¶¶ 30-32.) Further, DiBlasio asserts that a consultant retained by Hampton was unqualified to render a neutral, unbiased and competent opinion as to whether DiBlasio was providing substandard readings of mammography films. (Am. Compl. ¶ 35.)

On Wednesday, May 17 Hampton asked DiBlasio to attend a meeting to confirm that he had read specific mammograms. (Am. Compl. ¶ 63.) Hampton offered to meet DiBlasio in Troy, New York on either Friday, May 19 or Monday, May 22. (Am. Compl. ¶ 63.) Hampton informed DiBlasio that whatever date he choose, DOH would send a notice of the meeting, but that the letter may not reach him before the meeting. Further, Hampton did not relay the letter's contents to DiBlasio. (Am. Compl. ¶ 65.) DiBlasio agreed to meet on Monday, May 22. (Am. Compl. ¶ 66.)

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On Saturday May 20, DiBalsio received the notice letter. The letter provided information about the May 22 meeting and identified fifty different patients whose treatment was under investigation. (Am. Compl. ¶ 67.) Upon receiving the notice letter, DiBlasio called Hampton. (Am. Compl. ¶ 68.) Hampton informed DiBlasio that the notice was a form letter and that the DOH just needed to confirm that DiBlasio read certain X-rays. (Am. Compl. ¶ 68.) The notice letter did not advise DiBlasio of his right to have counsel attend the meeting. (Am. Compl. ¶ 69.)

On May 22, DiBlasio met with Hampton and the OPMC. (Am. Compl. ¶ 72.) On May 29, Novello summarily suspended DiBlasio's license to practice medicine in New York State on the ground that DiBlasio posed an imminent danger to the public at large. (Am. Compl. ¶¶ 81, 104.) Formal professional misconduct charges were simultaneously brought against DiBlasio. (Am. Compl. ¶ 82.) Further, the case against DiBlasio was prosecuted jointly with charges concurrently brought against Bier P.C. (Am. Compl. ¶ 87.)

On May 31, Novello conducted a press conference at which she announced the summary suspension of DiBlasio and the charges against him. (Am. Compl. ¶ 116.) At the press conference Novello made statements about DiBlasio that were allegedly false and injured his personal, professional and business reputations. (Am. Compl. ¶¶ 119, 123.) Further, many of Novello's statements were reported in newspaper articles. (Am. Compl. ¶¶ 122-123 & Exs. A-D.)

That same day, the DOH issued an allegedly defamatory press release announcing the summary suspension of DiBlasio and the underlying charges. (Am. Compl. ¶ 124 & Ex. E.) The press release appeared on the DOH's website and remained available as late as the filing of this motion despite DiBlasio's request to cease its publication. (Am. Compl. ¶¶ 125-126.)

Approximately one month after the May 31 press conference, Novello or DOH representative reiterated the defamatory statements previously made at the earlier press conference, and suggested purported "criminality" and patient deaths possibly attributable to DiBlasio. (Am. Compl. ¶ 127.) These statements were also memorialized in press releases by the DOH and reported in subsequent newspaper articles. (Am. Compl. ¶ 128 & Exs. F-G.)

From July 2000 to December 2000, a panel of the DOH's Board of Professional Medical Conduct ("Panel") conducted disciplinary hearings against DiBlasio pursuant to Section 230 of the New York Public Health Law. (Declaration of Mark Furman dated Nov. 28, 2001 ("Furman Decl.") ¶¶ 2, 4 & Ex. B.) At the hearing's conclusion, the Panel initially recommended modifying DiBlasio's summary suspension. (Furman Decl. Ex. B.) That preliminary recommendation stated,

> [t]here is clear evidence in the record demonstrating significant problems with Dr. DiBlasio's interpretations of the mammograms for the specific patients at issue in this case. This evidence warrants a continued suspension of

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> [DiBlasio's] ability to read and interpret mammograms pending the final resolution of this case. However, by a vote of 2-1, the Hearing Committee determined that there is insufficient evidence to conclude, by a preponderance of the evidence, that [DiBlasio's] resumption of the practice of radiology in general would constitute an imminent danger to the health of the people of this state.

(Furman Decl. Ex. B.)

On December 28, Novello rejected the Panel's recommendation and continued the suspension of DiBlasio's license in its entirety, until the final determination of the Panel. (Decl. of James M. Hershler dated Oct. 26, 2001 ("Hershler Decl.") Ex. Art. 78 Moving Papers, Verified Petition Ex. E; Furman Decl. ¶ 7.) Thereafter, DiBlasio filed an Article 78 proceeding in the Supreme Court of the State of New York to enjoin Novello from enforcing the unmodified summary suspension of his license. DiBlasio further sought to reverse Novello's December 28 determination rejecting the modification of the suspension. DiBlasio also sought an evidentiary hearing to determine the nature of any *ex parte* contacts between Novello and the OPMC to determine the extent, if any, that said contact has violated the integrity of the hearings before the panel. (Hershler Decl. Ex. Art. 78 Moving Papers, Verified Petition at 14-15; Furman Decl. ¶¶ 9-10.)

On January 12, 2001, the Article 78 Court preliminarily enjoined Novello from enforcing the continued summary

suspension of DiBlasio's license and authority to practice medicine in New York on the condition that DiBlasio resume the practice of radiology excluding mammography under supervision at Brookdale Hospital. (Furman Decl. ¶ 17 & Ex. C; Hershler Decl. Ex. Order dated Jan. 12, 2001.) On January 23, after a full hearing on the merits, the Article 78 Court vacated its injunction and denied DiBlasio's petition after finding that Novello's December 28 refusal to modify DiBlasio's suspension was not arbitrary and capricious. (Hershler Decl. Ex. Order dated Jan. 25, 2001.) It also found that New York's Public Health Law afforded great latitude to Novello. (Hershler Decl. Ex. Order dated Jan. 25, 2001.) Moreover, it noted that the Panel's recommendation was only a recommendation to Novello, and that her ultimate decision did not appear "arbitrary and capricious" but rather was based on the totality of the facts before her. (Hershler Decl. Ex. Order dated Jan. 25, 2001.) Finally, the Article 78 Court found "insufficient basis to vacate the order issued by the respondent on December 28, 2000." (Hershler Decl. Ex. Order dated Jan. 25, 2001.)

On January 26, the Panel issued its final Determination and Order unanimously dismissing all charges against DiBlasio and fully reinstating DiBlasio's license to practice medicine. (Furman Decl. Ex. D; Am. Compl. ¶ 132.) The Panel found the testimony of one of DOH's witnesses concerning DiBlasio's breast cancer detection rate at Bier P.C., to be flawed in several respects. The Panel also found the radiologist presented by DOH to be unqualified as an expert witness in mammography and his testimony to be troubling in several respects. (Furman Decl. Ex. D at 12-14.) Lastly, the Panel determined that DOH's consultant was

unreliable and not qualified, that the wrong medical and legal standards were used to prosecute DiBlasio, and that there was no basis to prosecute DiBlasio for professional misconduct or summarily suspend him. (Am. Compl. ¶ 132.)

DiBlasio filed this action on May 25, 2001. In the Amended Complaint, DiBlasio alleges fifteen causes of action for money damages including malicious prosecution, libel, slander, violations of DiBlasio's civil rights under 42 U.S.C. § 1983, and violations of New York Public Health Law Section 230 procedures. Specifically, DiBlasio alleges that DOH's statistical study of Bier P.C. was flawed; DOH's consultant was unqualified and biased, and his review of the mammograms erroneous; DOH suppressed exculpatory evidence in bringing the disciplinary proceedings against DiBlasio; the proceedings initiated by DOH were unfair and failed to follow established New York State procedures; the summary suspension procedure is facially unconstitutional and was applied unconstitutionally to DiBlasio; Novello breached New York State confidentiality requirements and defamed DiBlasio by issuing false public statements about the summary suspension and DOH's efforts to re-screen Bier P.C.'s patients; and DOH's website improperly published and continues to publish Novello's defamatory statements on its website.

Defendants move to dismiss all of DiBlasio's causes of action based on several grounds: (1) sovereign immunity requires dismissal of the claims against the DOH, and Novello and Hampton in their official capacities, as agencies and officers of New York State; (2) Novello's public statements were absolutely privileged as they were within

her role as Commissioner of the DOH and concerned a matter of compelling public importance; (3) Novello and Hampton are entitled to absolute immunity since physician disciplinary proceedings are quasi-judicial in nature; (4) the *Rooker-Feldman* doctrine and collateral estoppel bar plaintiffs' claims; and (5) the Amended Complaint fails to state a claim.

Discussion

On a motion to dismiss, a court typically must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor. *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998). A court should not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *accord Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995). This standard is applied "with particular strictness" when a plaintiff complains of civil rights violations. *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991); *accord Dwyer v. Regan*, 777 F.2d 825, 829 (2d Cir. 1985). Dismissal is proper when the plaintiff fails to plead the basic elements of a cause of action. *See Wright v. Giuliani*, No. 99 Civ. 10091 (WHP), 2000 WL 777940, at *4 (S.D.N.Y. June 14, 2000).

In support of their motion to dismiss, defendants reference and submit a number of documents that are extrinsic to the Amended Complaint. In opposition to defendants' motion to dismiss, DiBlasio also references and submits a number of documents, affidavits, and declarations. This Court

may consider documents incorporated by reference in the pleadings or documents either in plaintiff's possession or of which a plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Further, where subject matter jurisdiction is at issue the Court may consider documents relevant to that issue that are extrinsic to the Amended Complaint. *Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002). Thus, while it is appropriate to consider certain documents supplied to the Court by the parties—the Article 78 petition and orders, the orders by Novello and the panel—this Court declines the invitation to consider the substantive declarations and affidavits submitted by DiBlasio in opposition to the motion[1] and thus effectively convert this motion into one for summary judgment. *See* Fed. R. Civ. P. 12(c).

I. *Rooker-Feldman*

Defendants argue that this Court lacks subject-matter jurisdiction under the *Rooker-Feldman* doctrine based on DiBlasio's Article 78 proceeding. Generally stated, this prudential doctrine provides that "inferior federal courts have no subject matter jurisdiction over cases that effectively seek review of judgments of state courts and that federal review, if any, can occur only by way of a certiorari petition to the Supreme Court." *Moccio v. New York State Office of Court*

1. The Court will, however, consider these declarations and affidavits with respect to the subject-matter jurisdiction issue, but notes that the undated Declaration of Scott Einiger and the Affidavit of Mario DiBlasio, M.D. dated Nov. 28, 2001, mainly address the substantive merits of the motion to dismiss and thus will not be considered since they are extrinsic to the Amended Complaint.

Admin., 95 F.3d 195, 197 (2d Cir. 1996); *accord Phifer*, 289 F.3d at 55; *Whitely v. Comsat Corp.*, No. 00 Civ. 9401 (WHP), 2001 WL 1135946, at *5 (S.D.N.Y. Sept. 25, 2001). "Such jurisdiction is lacking because within the federal system, only the Supreme Court may review a state court judgment." *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998); *accord Phifer*, 289 F.3d at 55. The prohibition on district court review of state court judgments extends to cases that are "inextricably intertwined" with a state court's determinations. *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Hachamovitch*, 159 F.3d at 693-94. A "federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring); *accord Phifer*, 289 F.3d at 55-56; *Moccio*, 95 F.3d at 199-200; *Whitely*, 2001 WL 1135946, at *5.

The limits of the *Rooker-Feldman* doctrine have not been clearly delineated by the Supreme Court. Nonetheless, the Second Circuit has held that the doctrine is, at a minimum, coextensive with preclusion principles. *See Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 137-38 (2d Cir. 1997); *Moccio*, 95 F.3d at 199-200; *Crosland v. City of New York*, 140 F. Supp. 2d 300, 309 (S.D.N.Y. 2001). Thus, the *Rooker-Feldman* doctrine bars litigation in federal court that also would be barred under the principles of preclusion—res judicata and collateral estoppel. *See Hachamovitch*, 159 F.3d at 695; *Doctor's Assocs.*, 107 F.3d at 137-38; *Moccio*, 95 F.3d at 199-200; *Caserta v. Selsky*, No. 01 Civ. 2644 (BSJ), 2002 WL 1359727, at *3 (S.D.N.Y. June 20, 2002). However,

the *Rooker-Feldman* doctrine is broader than res judicata because it applies to reviews of interlocutory orders of state courts, as well as final decisions. *See Doctor's Assocs.*, 107 F.3d at 137-38; *see also Harris v. New York State Dep't of Health*, 202 F. Supp. 2d 143, 160 (S.D.N.Y. 2002) ("Moreover, the [*Rooker-Feldman*] doctrine may apply to bar exercise of federal jurisdiction over actions involving both final and interlocutory judgments of state courts.").

Applying these principles, the Second Circuit has held that the *Rooker-Feldman* doctrine applies if the precise claims raised in a state court proceeding are raised in a subsequent federal proceeding. Conversely, the doctrine does not apply when the claims in the federal action were never raised in the state court and plaintiff did not have the opportunity to present them in the state court proceedings. *See Moccio*, 95 F.3d at 199; *Crosland*, 140 F. Supp. 2d at 309; *Whitely*, 2001 WL 1135946, at *5. Further, "where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of preclusion." *Moccio*, 95 F.3d at 199-200; *accord Crosland*, 140 F. Supp. 2d at 309; *Whitely*, 2001 WL 1135946, at *5. Thus, this Court must analyze whether DiBlasio's claims would ~~be barred~~ under the principles of preclusion.

"[R]es judicata does not apply to bar a § 1983 action where a plaintiff has previously brought an Article 78 proceeding." *Hachamovitch*, 159 F.3d at 695; *accord Moccio*, 95 F.3d at 200; *Caserta*, 2002 WL 1359727, at *2; *Crosland*, 140 F. Supp. 2d at 309. However, collateral estoppel based

on rulings in an Article 78 proceeding applies to § 1983 actions. *Moccio*, 95 F.3d at 200; *Caserta*, 2002 WL 1359727, at *2; *see also Hachamovitch*, 159 F.3d at 695 (applying collateral estoppel); *Crosland*, 140 F. Supp. 2d at 309 (same).

For the much narrower preclusion of collateral estoppel to apply under New York law depends whether (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. *Hachamovitch*, 159 F.3d at 695; *Moccio*, 95 F.3d at 200; *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995); *Caserta*, 2002 WL 1359727, at *2. "The party asserting preclusion bears the burden of demonstrating that the issue was actually and necessarily decided, and the opposing party bears the burden of demonstrating the absence of a full and fair opportunity to litigate." *Caserta*, 2002 WL 1359727, at *2; *accord Colon*, 58 F.3d at 869; *Crosland*, 140 F. Supp. 2d at 309.

Here, defendants have not met their burden. DiBlasio's Article 78 proceeding sought to enjoin Novello and the DOH from enforcing Novello's December 28 determination to continue the summary suspension unmodified. The Article 78 proceeding also sought an evidentiary hearing concerning *ex parte* contacts between Novello and the panel. (Hershler Decl. Ex. Article 78 Verified Petition at 14-15.) DiBlasio's petition referred to the summary suspension and Novello's statements to the press, but did not seek a reversal of the original May 25 summary suspension on the merits. (Hershler Decl. Ex. Article 78 Verified Petition ¶ ¶ 11-14.)

Thus, the Article 78 Court never actually and necessarily decided the issue currently before this Court. First, based on the Article 78 petition, none of the issues before this Court were presented to the Article 78 Court. The mere mention of the summary suspension order and Novello's press conferences and statements to the press does not present issues concerning those events to the Article 78 Court. Further, DiBlasio's claim that Public Health Law Section 230 is unconstitutional on its face could not be brought in the Article 78 proceeding. *Hachamovitch,* 159 F.3d at 695 ("A petitioner may not challenge the validity of a legislative act or regulation in an Article 78 proceeding but may raise a claim that the administrative application of a rule to him is unconstitutional."); *accord Moccio,* 95 F.3d at 199. Thus, at the very least DiBlasio's claim that Section 230 is facially unconstitutional is not barred by the *Rooker-Feldman* doctrine because it could not have been raised in the Article 78 proceeding.

Further, the Article 78 Court initially enjoined Novello from "enforcing the summary suspension of [DiBlasio's] license and authority to practice medicine in the State of New York provided the petitioner assume the practice of radiology other than mammography only at Brookdale Hospital under supervision." (Hershler Decl. Ex. Order dated Jan. 12, 2001.) After a full hearing on DiBlasio's petition, the Article 78 Court found DiBlasio's allegations concerning Novello's December 28 determination to be without merit. (Hershler Decl. Ex. Order dated Jan. 25, 2001.) It concluded,

> [t]he thrust of [DiBlasio's] argument is that [Novello's] decision was contrary to the State

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> Board for Professional Medical Conduct ("SBPMC") Panel's recommendation for limited restoration for [DiBlasio's] license pending a final determination. [Novello] is not bound to accept the committee's recommendation but rather to take such recommendation into consideration in making the determination of whether or not to modify the preliminary order pending the outcome of the hearing.

(Hershler Decl. Ex. Order dated Jan. 25, 2001.)

The Article 78 Court then discussed the factual background to its decision,

> [i]n the case at bar the SBPMC Panel recommended that the petitioner's license be restored on a limited basis. However, this is just a recommendation and the final arbiter of such a decision is [Novello]. The decision made by [Novello] in view of all the facts does not appear to this court to be arbitrary and capricious but rather based on the totality of the facts before her. [Novello's] determination is not the final decision in this matter, the final decision [whether DiBlasio's license would be revoked] is yet to be made, but pending said decision, this court finds insufficient basis to vacate the order issued by [Novello] on December 28, 2000. Accordingly, [DiBlasio's] Order to Show Cause is hereby denied.

(Hershler Decl. Ex. Order dated Jan. 25, 2001.) Moreover, even had DiBlasio raised the claims he brings in this action in his December 2000 Article 78 proceeding, the applicable four month statute of limitations would have barred them. N.Y. C.P.L.R. § 217 (McKinney's 2002).

Lastly, this is not a case where, if this Court found for DiBlasio, "the federal claim succeeds to the extent that the state court wrongly decided the issues before it." *Pennzoil,* 481 U.S. at 25 (Marshall, J., concurring); *see, e.g., Phifer,* 289 F.3d at 59; *Hachamovitch,* 159 F.3d at 695. Although the Article 78 Court observed that Novello's "authority to summarily suspend a physician's license pending an administrative hearing has been consistently upheld by the Courts," (Hershler Decl. Ex. Order dated Jan. 25, 2001), its review was limited to Novello's decision on December 28 continuing DiBlasio's summary suspension despite the Panel's recommendation. DiBlasio only challenges the original May 25 suspension in this action. Nevertheless, the Article 78 Court lacked jurisdiction over the constitutional challenge to the summary suspension provision in Public Health Law Section 230. Therefore, the Article 78 Court's statements regarding Novello's power to suspend DiBlasio summarily are dicta and cannot be considered as "actually and necessarily deciding" the issue. Putting that aside, DiBlasio did not have a full and fair opportunity to challenge Section 230 as unconstitutional on its face. *See Hachamovitch,* 159 F.3d at 695.

Moreover, the Second Circuit has cautioned that application of *Rooker-Feldman* may be inappropriate where the statutory grant of subject matter jurisdiction falls under

28 U.S.C. § 1331. *Hachamovitch*, 159 F.3d at 695; *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1308 (2d Cir. 1990) ("'[T]he presence of a federal basis for jurisdiction may raise the level of justification needed for abstention.'" (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976)).

Thus, defendants fail to prove that the issues presently before this Court in DiBlasio's Amended Complaint were actually and necessarily decided in DiBlasio's Article 78 proceeding. Accordingly, defendants' motion to dismiss based on the *Rooker-Feldman* doctrine is denied.

II. *Eleventh Amendment Immunity*

Defendants contend that DiBlasio's causes of action against Novello and Hampton, in their official capacities, and the DOH must be dismissed because they are barred by the Eleventh Amendment. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. An unconsenting state is immune from suits in federal court brought by its own citizens, *see Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001), as is a state official when the state is the real party in interest, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-47 (1993). The Amendment bars claims that seek either monetary

damages or retroactive injunctive relief. *McGinty*, 251 F.3d at 91; *see also Cory v. White*, 457 U.S. 85, 90-91 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."). This "rule applies 'to States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes.'" *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities*, 64 F.3d 810, 815 (2d Cir. 1995) (quoting *Will v. Michigan Dept. of Police*, 491 U.S. 58, 71 (1989)).

Here, it is undisputed that DiBlasio's monetary damages claims against the DOH and Novello and Hampton, in their official capacities, are against New York State and thus must be dismissed. *See Dwyer*, 777 F.2d at 835-37; *Komlosi*, 64 F.3d at 815; *see also Harris*, 202 F. Supp. 2d at 178 ("[T]he Eleventh Amendment bars actions seeking retroactive damages in federal courts directly against a sate or its agencies.").

DiBlasio infers that his suit is outside of Eleventh Amendment immunity because he seeks injunctive relief. *Ex Parte Young*, 209 U.S. 123, 155-56 (1908). In *Young*, the Supreme Court recognized that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Young* 209 U.S. at 155-56); *accord Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000). This principle, however, is limited to prospective injunctive relief. *See Pennhurst*, 465 U.S. at 102-03 (citing *Edelman*, 415 U.S. at 666-67) ("[W]hen a

plaintiff sues a state official alleging violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."); *Ward*, 207 F.3d at 119 ("[T]he Supreme Court has declined to extend the reasoning of *Ex Parte Young* to claims for retrospective relief.").

DiBlasio seeks to order defendants to "cease and desist . . . continuous publication of the May 31 Press Release and any other statements of and concerning [DiBlasio] that appear on the [DOH's] or any other New York State web site." (Am. Compl.¶ 155.) That injunctive relief stems from DiBlasio's state law claim for libel. Thus, DiBlasio does not seek injunctive relief for a continuing violation of federal law.[2]

Accordingly, New York State's sovereign immunity under the Eleventh Amendment requires all of DiBlasio's causes of action against Novello and Hampton, in their official capacities, and the DOH to be dismissed.

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2. DiBlasio's claim of a violation of 42 U.S.C. § 1983 by the combination of defendants defamation and deprivation of a liberty and property interest similarly cannot be sustained against the DOH, and Novello and Hampton in their official capacities either. DiBlasio does not seek injunctive relief based on that claim, nor could DiBlasio argue that there is a continuing violation of federal law. The deprivation of DiBlasio's liberty and property interest in DiBlasio's license to practice medicine occurred in the past and does not continue. "Injunctive relief or declaratory relief is useless to a person who has already been injured." *Butz v. Economou*, 438 U.S. 478, 504 (1978).

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III. *Absolute Immunity from § 1983 Actions*

Defendants argue that quasi-judicial or quasi-prosecutorial absolute immunity protects them from the § 1983 causes of action.[3] This Court finds that the § 1983 claims against Novello and Hampton should be dismissed based on absolute immunity.

It is axiomatic that "officials acting in a judicial capacity are entitled to absolute immunity against § 1983 actions, and this immunity acts as a complete shield to claims for money damages." *Montero v. Travis,* 171 F.3d 757, 760 (2d Cir. 1999); *accord Stump v. Sparkman,* 435 U.S. 349, 355-56 (1978); *Scotto v. Almenas,* 143 F.3d 105, 110 (2d Cir. 1998). Quasi-judicial immunity, like other forms of official immunity, is immunity from suit, not just an ultimate finding of damages. *Mireles v. Waco,* 502 U.S. 9, 11 (1991) (per curiam); *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). "This immunity also extends to administrative officials

3. However, defendants do not argue that DiBlasio's third and seventh causes of action—violation of § 1983 by defaming DiBlasio during the course suspending his medical license without due process, and by depriving DiBlasio of his right to confidentiality in Section 230 without due process, respectively—should be dismissed on absolute immunity grounds. Nor could they. Statements to the press or public cannot be said to be closely associated with the judicial process, nor within the scope of a prosecutor's litigation-related duties in the judicial duties. *See Buckely v. Fitzsimmons,* 509 U.S. 259, 277-78 (1993) ("Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor."); *Powers v. Coe,* 728 F.2d 97, 103 (2d Cir. 1984) ("[O]nly good faith immunity is available where a prosecutor distributes extraneous statements to the press. . . .").

performing functions closely associated with the judicial process because the role of the 'hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge.'" *Montero,* 171 F.3d at 760 (quoting *Butz v. Economou,* 438 U S. 478, 513 (1978)); *accord Scotto,* 143 F.3d at 110-11.

Moreover, prosecutors are also entitled to absolute immunity from suits for damages arising from activities that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976); *accord Buckley v. Fitzsimmons,* 509 U.S. 259, 268-70 (1993); *Parkinson v. Cozzolino,* 238 F.3d 145, 150 (2d Cir. 2001); *Pinaud v. County of Suffolk,* 52 F.3d 1139, 1147 (2d Cir. 1995); *Barbera v. Smith,* 836 F.2d 96, 99-100 (2d Cir. 1987). Likewise, "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Butz,* 438 U.S. at 515. However, absolute immunity will not apply to a prosecutor's acts of investigation or administration that are beyond the scope of her litigation-related duties. *Buckley,* 509 U.S. at 270; *Dory v. Ryan,* 25 F.3d 81, 83 (2d Cir. 1994); *Pinaud,* 52 F.3d at 1147; *Barbera,* 836 F.2d at 99-100.

As Judge Learned Hand wrote,

> [a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those

> who try to do their duty to the constant dread of retaliation.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); *accord Imbeler*, 424 U.S. at 428; *Pinaud*, 52 F.3d at 1147.

Courts apply a "functional approach" to determining whether an official should be granted absolute immunity. *Buckley*, 509 U.S. at 269; *Parkinson*, 238 F.3d at 150; *Scotto*, 143 F.3d at 110. This approach "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley*, 509 U.S. at 269 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)); *accord Parkinson*, 238 F.3d at 150; *Scotto*, 143 F.3d at 110. The Court must focus "on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley*, 509 U.S. at 271. DiBlasio's § 1983 claims can be grouped into three categories of conduct that violated DiBlasio's constitutional rights: (1) Novello's press conferences and the DOH press releases; (2) the "investigation" and prosecution of DiBlasio leading to the suspension; and (3) Novello's suspension of DiBlasio's license to practice medicine on May 25, 2000. Defendants argue that only the latter two categories are barred by absolute immunity.

A. *The DiBlasio Investigation*

DiBlasio's eleventh cause of action alleges that defendants violated § 1983 by depriving DiBlasio of his right to a fair and unbiased investigation under N.Y. Public Health Law Section 230. (Am. Compl.¶¶ 220-226.) The fifteenth

cause of action alleges that defendants violated § 1983 by their unconstitutional malicious prosecution of DiBlasio. (Am. Compl. ¶¶ 248-53.) Defendants argue that absolute immunity protects them because the actions complained of are prosecutorial in nature.

DiBlasio alleges that defendants maliciously and improperly commenced administrative proceedings against DiBlasio without a careful review of objectively investigated facts and in furtherance of their own improper personal and professional motivations. (Am. Compl. ¶¶ 248-253.) It further asserts that the investigation of his medical license was unfair and biased, and thus violated Section 230. (Am. Compl.¶ 216.)

As previously noted, a prosecutor's acts of investigation or administration that are beyond the scope of her litigation-related duties will not be accorded absolute immunity. DiBlasio contends that the defendants' actions with respect to these claims are clearly investigatory and therefore outside the scope of their litigation-related duties.

The function of initiating and pursuing administrative charges is afforded absolute immunity, as is the decision whether or not to bring those charges. *Buckely,* 509 U.S. at 269 ("[A] state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial."); *Butz,* 438 U.S. at 515 ("We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against

an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution."); *Imbler,* 424 U.S. at 430 ("We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 530 (2d Cir. 1993) ("A prosecutor thus has absolute immunity in connection with the decision whether or not to commence a prosecution."); *Powers,* 728 F.2d at 103 (noting that a prosecutor's quasi-judicial activities "include the initiation of a prosecution and the presentation of the Government's case").

Accordingly, DiBlasio's claims for damages arising from defendants' prosecution of or initiation of disciplinary charges are dismissed.

Similarly, with respect to DiBlasio's allegations concerning the investigation of DiBlasio, defendants must be accorded absolute immunity. "'[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity." *Buckley,* 509 U.S. at 272 (quoting *Imbler,* 424 U.S. 431 n.31); *accord Powers,* 728 F.2d at 104. In particular,

> [the] acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence

> assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckely, 509 U.S. at 273; *accord Mishler v. Clift*, 191 F.3d 998, 1004 (9th Cir. 1999); *Ostrezenski v. Seigel*, 177 F.3d 245, 250 (4th Cir.1999); *Dory*, 25 F.3d at 83; *but see Parkinson*, 238 F.3d at 151 ("We are aware of the cases that speak of absolute immunity applying to 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial.' Such language, however, does not serve to delineate the *endpoint* of immunity. Rather, it simply underscores the fact that absolute immunity does not apply to the investigatory duties of a prosecutor, that is, it serves to establish the *starting point* of such immunity." (quoting *Buckley*, 509 U.S. at 273) (emphasis in original)).

"Clearly, some evidentiary review is necessary to determine whether to pursue charges, and a prosecutor is held to be absolutely immune from liability for performing such duties." *Ostrezenski*, 177 F.3d at 250. Further, the Supreme Court has not "purported to draw bright lines between quasi-judicial absolutely immune conduct, on the one hand, and investigative and administrative qualifiedly immune behavior, on the other." *Powers*, 728 F.2d at 104. "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Buckley*, 509 U.S. at 273.

Here, DiBlasio alleges the interview with Hampton and the OPMC violated his constitutional rights. However, that meeting was statutorily mandated prior to convening an investigation committee on professional misconduct of the board for professional medical conduct, which is the beginning of the process of determining whether to bring medical disciplinary charges resulting in a disciplinary hearing. *See* N.Y. Pub. Health Law §§ 230(10)(iii)-(iv) (McKinney's 2002). Moreover, DiBlasio's allegations of an unconstitutional investigation all concern either the process of determining whether to bring disciplinary charges against the physician or actually part of the process of bringing disciplinary charges against DiBlasio, or the actual suspension of DiBlasio's license. These allegations concerning reliance on flawed evidence or unqualified witnesses go to the heart of a prosecutor's role of presenting evidence to initiate charges against DiBlasio.

The interview of DiBlasio, which was in preparation for the initiation of disciplinary proceedings, was required by statute to give the physician under scrutiny an opportunity to "provide an explanation of the issues under investigation," not to further investigate the physician. N.Y. Pub. Health Law § 230(10)(iii). At this interview the physician is permitted to have counsel present and submit written comments or expert opinion. N.Y. Pub. Health Law § 230(10)(iii). Thus, defendants are entitled to absolute immunity for their roles in the investigation of DiBlasio. *See Ostrezenski,* 177 F.3d at 251 ("In sum, a physician requested by the Board to conduct a peer review performs a function analogous to a prosecutor reviewing evidence to determine whether charges should be brought."); *Moran v. Conn. Dep't of Pub. Health*

and Addition Servs., 954 F. Supp. 484, 490 (D. Conn. 1997) (holding that the functions of officials at the Connecticut Department of Health who moved to suspend and ultimately suspended physician's license to practice medicine pending a hearing "were prosecutorial in nature").

The defendants' conduct is akin to a prosecutor's role in the grand jury process or in plea negotiations, which are clearly absolutely immune, in contrast to the role of a detective or police officer. *See Pinaud,* 52 F.3d at 1149 ("Case law from this circuit clearly establishes that the district attorneys' activities with respect to the malicious prosecution claim, as well as all the claims relating to [plaintiff's] plea agreement and the presentations to the grand jury, are covered by absolute immunity."); *Powers,* 728 F.2d at 104 ("However, we also believe that a prosecutor must be permitted to work with a grand jury totally free of the threat of civil suit."); *Taylor v. Kavanagh,* 640 F.2d 450, 453 (2d Cir. 1981) ("We are satisfied that a prosecutor's activities in the plea bargaining context merit the protection of absolute immunity. The plea negotiation is an 'essential component' of our system of criminal justice.").

Moreover, granting absolute immunity to defendants for this claim is supported by public policy. There is a strong need to ensure that officials of the DOH perform their duties without fear of harassment, intimidation, and especially, civil damages. *Ostrezenski,* 177 F.3d at 250-51. The ability of officials, such as defendants, to perform their jobs free from the threat of civil damages lawsuits is especially compelling where defendants are protecting the public from physicians that commit professional misconduct, and where the

likelihood of retaliatory civil actions is very real. *See Ostrezenski*, 177 F.3d at 250-51 ("A physician anticipating disciplinary action, including the loss of a license to practice medicine, may well seek vengeance."); *Moran*, 954 F. Supp. at 490 ("The public interest in the effective execution of administrative policy is equally compelling in the field of state medical licensing.").

Accordingly, DiBlasio's eleventh and fifteenth causes of action concerning the allegedly unconstitutional investigation are dismissed.

B. *Novello's Summary Suspension of DiBlasio*

DiBlasio also alleges that his summary suspension of May 25 violated his constitutional rights. (Am. Compl. ¶¶ 176-88, 208-14, 235-41.) Specifically, DiBlasio alleges that Section 230 of the Public Health Law is unconstitutional on its face because it permits the Commissioner to suspend a physician only based upon a "determination" and "recommendation" of the investigative committee without providing the standard of proof upon which the investigative committee shall make their determination and recommendation (Am. Compl. ¶¶ 176-83). Moreover, DiBlasio contends that Section 230 was unconstitutional as applied to him because he was suspended in violation of statutory procedure in Section 230. (Am. Compl. ¶¶ 184-88, 203-07.) He also claims that Novello's suspension was not the least restrictive manner to address DiBlasio's violation of the Public Health Law. (Am. Compl. ¶¶ 235-41.) Defendants argue absolute immunity bars those claims because the actions complained of are adjudicative in nature.

Appendix B

Officials of state agencies are entitled to absolute immunity when they function in a quasi-judicial way or perform judicial functions. *Butz*, 438 U.S. at 513; *Scotto*, 143 F.3d at 110-11; *Montero*, 171 F.3d at 760. "Whether non-judicial officers merit quasi-judicial absolute immunity depends upon 'the functional comparability of their judgments to those of [a] judge.'" *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994) (quoting *Imbler*, 424 U.S. at 423 n.20). Six non-exhaustive factors to be considered when determining whether the non-judicial officer's function shares characteristics with a judicial function are

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of the error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512); *accord Butz*, 438 U.S. at 512; *Young*, 41 F.3d at 51.

Several courts of appeals have concluded that revocation or suspension of a medical doctor's license is quasi-judicial thereby affording those members of the state's medical board who revoked or suspended the license, absolute immunity from § 1983 actions. *See, e.g., Mishler v. Clift*, 191 F.3d 998, 1007-08 (9th Cir.1999); *Wang v. New Hampshire Board of*

Registration in Medicine, 55 F.3d 698, 701-02 (1st Cir. 1995); *Watts v. Burkhart*, 978 F.2d 269, 275-78 (6th Cir. 1992) (en banc); *Bettencourt v. Board of Registration in Medicine of the Commonwealth of Massachusetts*, 904 F.2d 772, 782-85 (1st Cir. 1990); *Horowitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508, 1515 (10th Cir. 1987); *see also O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62, 65-67 (5th Cir. 1997) (nursing board).

Defendants argue that their conduct in suspending DiBlasio's license was similar to the board members' actions in those cases holding that revocation of a license, or the conduct of a disciplinary hearing, is absolutely immune. DiBlasio does not argue that a medical board that revokes a physician's license after a full disciplinary hearing should not be accorded absolute immunity. Instead, he asserts that the suspension of his license differed from a disciplinary board's revocation of a license after a full trial-like hearing, and that summary suspension procedures are not functionally comparable to judicial procedures. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint ("Pls.' Br.") at 14-16.) This Court disagrees.

DiBlasio was summarily suspended by Novello on May 25, 2000, pursuant to Section 230(12) of the New York Public Health Law. Section 230(12) states, in pertinent part,

> Summary action. (a) Whenever the commissioner, *after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct*, based

upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an *imminent danger* to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section, the commissioner may order the licensee, by written notice, to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service of the order. *Within ten days from the date of service of the said order, the state board for professional medical conduct shall commence and regularly schedule such hearing proceedings as required by this section, provided, however, that the hearing shall be completed within ninety days of the date of service of the order.* To the extent that the issue of imminent danger can be proven without the attorney representing the office of professional medical conduct putting in its entire case, the committee of the board shall first determine whether by a preponderance of the evidence the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people. The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the licensee's condition, activity or

> practice constitutes an imminent danger to the health of the people. The licensee shall have an opportunity to be heard and to present proof. When both the office and the licensee have completed their cases with respect to the question of imminent danger, the committee *shall promptly make a recommendation to the commissioner on the issue of imminent danger and determine whether the summary order should be left in effect, modified or vacated,* and continue the hearing on all the remaining charges, if any, in accordance with paragraph (f) of subdivision ten of this section. Within ten days of the committee's recommendation, the commissioner shall determine whether or not to adopt the committee's recommendations, in whole or in part, and shall leave in effect, modify or vacate his summary order. . . . (b) . . . The order of the commissioner shall constitute summary action against the licensee and become public upon issuance.

N.Y. Pub. Health Law § 230(12) (McKinney's 2002) (emphasis added).

Further Section 230(10)(iii) provides that the investigated party have

> an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation. *The licensee may have counsel present. Providing an opportunity for such an interview shall be a*

> *condition precedent to the convening of an investigation committee on professional misconduct of the board for professional medical conduct.* . . . The licensee shall be given *written notice of issues identified subsequent to the interview.* The licensee *may submit written comments or expert opinion* to the office of professional medical conduct at any time.

N.Y. Pub. Health Law § 230(10)(iii) (McKinney's 2002) (emphasis added).

Therefore, a statutorily mandated process was required to be followed prior to Novello's suspension of DiBlasio's license. First, Section 230(12) requires an investigation and a recommendation by an investigative committee *prior* to the Commissioner being able to summarily suspend a license. N.Y. Pub. Health Law § 230(12). That interview is a prerequisite to the investigative committee. N.Y. Pub. Health Law § 230(10)(iii). This interview pursuant to Section 230(10)(iii) enables the physician "to provide an explanation of the issues under investigation." N.Y. Pub. Health Law § 230(10)(iii). Significantly, the physician is also permitted to have counsel present at the interview, "submit written comments or expert opinion" at any time, and must be given "written notice of issues identified subsequent to the interview." N.Y. Pub. Health Law § 230(10)(iii).

Therefore, the Commissioner must determine whether to suspend a physician only after that physician receives notice of the investigation, an opportunity to respond with the benefit of counsel through oral and written testimony,

and only then after an investigative committee makes a recommendation to the Commissioner. The Commissioner's determination is certainly adjudicative, but this Court must determine whether that adjudicative process "shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Butz*, 438 U.S. at 512-13.

As Section 230 evidences, the process by which the Commissioner of the DOH may summarily suspend a physician's license provides for many safeguards to protect a physician's rights. These safeguards are, albeit not as plentiful as those provided in a full trial-like disciplinary hearing, sufficiently analogous to the judicial process to warrant absolute immunity. Several courts, including some courts of appeals, have held that members of a state Board of Medical Examiners are entitled to absolute immunity for their actions in summarily suspending a physician pending a final determination. *See, e.g., Watts*, 978 F.2d at 275-78; *Horowitz*, 822 F.2d at 1515; *Moran*, 954 F. Supp. at 490; *see also Howard v. Miller*, 870 F. Supp. 340, 344-45 (N.D. Ga. 1994) (holding, without deciding, that members of board of medical examiners were acting in their adjudicative roles in connection with the summary suspension of a physician's license).

In *Watts*, the Sixth Circuit described the function of summarily suspending a physician as "comparable to the function performed by a judge in deciding whether to issue a temporary restraining order or preliminary injunction." *Watts*, 978 F.2d at 277. DiBlasio relies on *DeRosa v. Bell*, 24 F. Supp. 2d 252 (D. Conn. 1998). In *DeRosa*, the court

found the analogy to a temporary restraining order ("TRO") to be

> a flawed analogy, however, in that the materials on which the decision were based were not brought before the Commissioner by an independent party seeking an adjudication, but rather by her own staff, who received the information through an interagency information sharing agreement. . . . The *ex parte* TRO is a particularly misleading example because it is one of the few judicial actions that is not subjected to the rigors of the adversary process.

DeRosa, 24 F. Supp. 2d at 257. Here, however, the party seeking adjudication—the investigative committee of the State Board for Professional Medical Conduct—is not part of the Commissioner's own staff, but independent members of the state board for professional medical conduct, who are appointed by either the Commissioner or the Board of Regents for terms of three years. N.Y. Pub. Health Law §§ 230(1)-(10). Moreover, this Court finds the Sixth Circuit's TRO analogy from *Watts* particularly relevant in the context of a summary suspension of a physician's license. Specifically, like a judge with a TRO, the summary suspension of a license is one of the few *ex parte* actions the Commissioner is permitted to take in her adjudicative function—the revocation of a license can only be effected after a full trial-like proceeding.

Further, Section 230(12) provides that the state board of professional misconduct must commence disciplinary

hearings against that physician within ten days of the Commissioner summarily suspending the physician's license. N.Y. Pub. Health Law § 230(12)(a). It also requires the disciplinary committee to "promptly" make a recommendation as to whether the summary suspension should be continued, modified, or vacated. N.Y. Pub. Health Law § 230(12)(a). Thus, Section 230 enables the disciplinary board to quickly correct any error committed by the Commissioner in suspending a physician's license.

Further, any suspension enacted by the Commissioner is subject to immediate appellate review through an Article 78 proceeding in the Supreme Court of the State of New York. In fact, it is noteworthy that DiBlasio took advantage of this safeguard to appeal Novello's December 28 decision to continue DiBlasio's suspension unmodified.[4] These procedural safeguards in the summary suspension process reduce the need for private damage actions as a means of controlling unconstitutional conduct.

The Commissioner of the DOH is also insulated from political influence despite the fact that her term in office is

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4. DiBlasio's argument that the procedural safeguards established in Section 230 were not complied with during his prosecution is of no moment. The Court's functional analysis does not concern itself with a plaintiff's allegation of wrongdoing, only the function defendant performed in connection with the acts complained about by the plaintiff. *See Mishler,* 191 F.3d at 1006 ("It is the available procedures, not the manner in which they are exercised in a particular case, that is the critical inquiry for determining whether there are safeguards that reduce the need for private damages actions.").

limited to the term of office of the governor who appointed her. N.Y. Pub. Health Law § 204 (McKinney's 2002). The Commissioner must be a physician with at least ten years' experience in the actual practice of her profession, and of skill and experience in public health duties and sanitary science. N.Y. Pub. Health Law § 203 (McKinney's 2002). Thus, as in *Watts,* the Commissioner is "an independent professional who [is] required by law to provide substantial due process protection," and is "at least as independent, one would assume, as state judges who must periodically stand for re-election." *Watts,* 978 F.2d at 276.

In addition, the summary suspension process is also adversarial in nature and provides correctability of error on appeal. The defending physician receives a notice informing him of the issues being scrutinized, has the right to counsel at his interview with the committee, and is at risk of losing the ability to practice his livelihood. *See Young,* 41 F.3d at 54. Additionally, the correctability of any error is self-evident as a disciplinary hearing must be convened within ten days of the summary suspension, the committee must "promptly" recommend whether to continue the suspension, and an Article 78 proceeding is available immediately to review the suspension.

Moreover, the suspension of a physician's license to practice medicine is very likely "to stimulate a litigious reaction from the disappointed physician, making the need for absolute immunity apparent." *Bettencourt v. Board of Registration in Medicine of the Commonwealth of Massachusetts,* 904 F.2d 772, 783 (1st Cir. 1990); *accord Watts,* 978 F.2d at 278; *Horowitz,* 822 F.2d at 1515. "In view

of the public interest of ensuring quality health care, there is a 'strong need' to make certain that [the Commissioner] can perform these disciplinary functions without the threat of harassment or intimidation." *Mishler,* 191 F.3d at 1005.

Lastly, public policy requires absolute immunity where defendants performed quasi-judicial functions, and where safeguards provided by Section 230 and Article 78 exist, since the threat of exposure "to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire,* 177 F.2d at 581 (Hand, J.); *accord Watts,* 978 F.2d at 274-75.

Thus, the function of the defendants in the summary suspension process shares enough of the characteristics of the judicial process to afford them absolute immunity.[5] Accordingly, DiBlasio's § 1983 causes of action alleging that the summary suspension was unconstitutionally defective are dismissed.

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5. There is nothing in the record regarding the Commissioner's use of precedent or the lack thereof in making summary suspension determinations. This is of no consequence. *See Mishler,* 191 F.3d at 1007 ("[W]hile the Board Members do not have all of the attributes of a federal hearing officer, they are functionally comparable to judges and prosecutors."); *O'Neal,* 113 F.3d at 66 ("[W]hile the record is unclear as to whether the board was bound by precedent, we nevertheless feel that this one factor is not controlling and is greatly overshadowed by the convincing nature of the five other variables.").

Appendix B

IV. *The Defamation/"Stigma Plus" Claim*

The third cause of action in the Amended Complaint alleges that DiBlasio's liberty and property interest were deprived by defendants' false and stigmatizing statements to the press and public without due process. (Am. Compl. ¶¶ 172-175.) Defendants argue that the DiBlasio received due process through a prompt post-deprivation hearing.

While injury to reputation alone is insufficient to establish a claim for harm to a liberty interest, "a cognizable claim will lie if a plaintiff can show loss of reputation plus some serious additional harm, such as loss of employment, as a result of defamatory remarks by a government official." *Komlosi,* 64 F.3d at 817; *accord Paul v. Davis,* 424 U.S. 693, 710 (1976); *Valmonte v. Bane,* 18 F.3d 992, 999-1001 (2d Cir. 1994). This type of claim has been commonly referred to a "stigma-plus" claim, where the plaintiff must allege stigma or loss of reputation plus some other tangible element to establish a constitutional deprivation. *Valmonte,* 18 F.3d at 999; *Neu v. Corcoran,* 869 F.2d 662, 667 (2d Cir. 1989). The Second Circuit has held that "a liberty interest is implicated when a plaintiff can show both harm to his reputation and serious damage to his prospects for future employment in his profession." *Komlosi,* 64 F.3d at 817 (citing *Huntley v. Cmty. Sch. Bd.,* 543 F.2d 979, 985 (2d Cir. 1976)).

Here, defendants do not argue that DiBlasio cannot allege a deprivation of a liberty or property interest resulting from defendants' alleged defamation. Defendants argue that adequate due process was provided to DiBlasio in the form

of a prompt post-deprivation hearing, as well as the ability to challenge the defendants' actions in an immediate Article 78 petition.

"When reviewing alleged procedural due process violations, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." *Hellenic Am. Neighborhood Action Comm. v. City of New York,* 101 F.3d 877, 880 (2d Cir. 1996); *accord Gudema v. Nassau County,* 163 F.3d 717, 724 (2d Cir. 1998); *Rivera v. Cmty. School Dist. Nine,* 145 F. Supp. 2d 302, 307 (S.D.N.Y. 2001) (*"Rivera I"*); *Federico v. Bd. of Educ. of the Pub. Schools of Tarrytown,* 955 F. Supp. 194, 201 (S.D.N.Y. 1997). "In the latter case, the Due Process Clause of the Fourteenth Amendment is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful postdeprivation [hearing]." *Hellenic,* 101 F.3d at 880; *accord Rivera I,* 145 F. Supp. 2d at 307; *Federico,* 955 F. Supp. at 201. If the deprivation occurs as a result of the "more structured environment of established state procedures, rather than random acts, the availability of postdeprivation procedures will not, ipso facto, satisfy due process." *Hellenic,* 101 F.3d at 880; *accord Rivera I,* 145 F. Supp. 2d at 307.

In the instant action, assuming *arguendo* that defendants' statements were defamatory and that DiBlasio suffered a deprivation of a liberty or property interest, the due process DiBlasio was entitled to only consisted of the opportunity for a post-deprivation "name-clearing hearing." *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 573 & n.12

(1972); *Komlosi*, 64 F.3d at 817-18; *O'Neill v. City of Auburn*, 23 F.3d 685, 691 (2d Cir. 1994); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991); *Rivera v. Cmty. School Dist. Nine*, Nos. 00 Civ. 8208 & 01 Civ. 1976 (SHS), 2002 WL 1461407, at *7 (S.D.N.Y. July 8, 2002) (*"Rivera II"*); *Hagemann v. Molinari*, 14 F. Supp. 2d 277, 286 (E.D.N.Y. 1998); *Esposito v. Metro-North Commuter R.R. Co.*, 856 F. Supp. 799, 807 (S.D.N.Y. 1994); *see also Silverman v. City of New York*, No. 98 Civ. 6277 (Glasser, J.), 2001 WL 218943, at *4-5 (E.D.N.Y. Feb. 2, 2001) (city employee stigmatized by his allegedly coerced resignation was not entitled to a predeprivation hearing because he was not terminated); *Ryan v. Carroll*, 67 F. Supp. 2d 356, 361 (S.D.N.Y. 1999) (noting that, although not present in that case, where defendants made stigmatizing disclosures about plaintiff that were arguably false plaintiff was entitled to a name-clearing hearing); *Sussman v. New York City Health and Hosps. Corp.*, No. 94 Civ. 8461 (LBS), 1997 WL 334964, at *10-11 (S.D.N.Y. June 16, 1997) (holding that doctor who in the course of being suspended was the subject of stigmatizing remarks was not entitled to a predeprivation hearing under due process clause); *Duran v. City of New York*, No. 96 Civ. 4219 (MBM) (LB), 1998 WL 603212, at *8-11 (S.D.N.Y. Sep. 11, 1998) (due process only required a postdeprivation hearing for a city employee who was stigmatized in connection with his termination).

DiBlasio alleges a due process violation resulting from Novello's allegedly defamatory and stigmatizing statements to the press concerning DiBlasio's suspension. (Am. Compl. ¶¶ 172-75.) DiBlasio argues that these statements breached the confidentiality protections in Section 230 and went

beyond the permissible disclosure in Section 230. (Am. Compl.¶ 116.)

Section 230 does not provide for the release of any information beyond the summary suspension order. Because Novello's comments were not disclosed pursuant to the statute, they were a random and unauthorized act.[6] *See Hageman,* 14 F. Supp. 2d at 286 (holding that defendant may have been authorized to explain his views to the media, but "not authorized to make defamatory remarks on television regarding a former employee"); *see also Rivera I,* 145 F. Supp. 2d at 308 (holding that stigmatizing statements by superintendent of school district were "random, unauthorized act, and not a state established procedure"); *Federico,* 955 F. Supp. at 201 ("Here, the alleged deprivation of a protected liberty interest without due process occurred because of random and arbitrary acts—statements made by various Board of Education members and [town] officials."). As Novello's statements were random and unauthorized acts, due process only requires a post-deprivation name clearing

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6. DiBlasio does not expressly argue or allege that Novello's comments were made pursuant to any state procedure or policy. However, DiBlasio relies on *Doe v. Dep't of Public Safety,* 271 F.3d 38 (2d Cir. 2001), and *Valmonte v. Bane,* 18 F.3d 992 (2d Cir. 1994), to argue that a postdeprivation hearing does not satisfy due process here, and that only a pre-deprivation hearing would. DiBlasio's reliance on those cases is misplaced as they are factually distinguishable. Both cases address factual situations where the plaintiff was stigmatized by an established state procedure, namely the publication of the list of registered sex-abusers to certain people, and not a random act of a state official. *See Doe,* 271 F.3d at 62; *Valmonte,* 18 F.3d at 1002-05.

hearing. *See Komlosi*, 64 F.3d at 817-18; *Rivera II*, 2002 WL 1461407, at *7; *Rivera I*, 145 F. Supp. 2d at 308; *Hagemann*, 14 F. Supp. 2d at 286; *Federico*, 955 F. Supp. at 201; *see also Esposito*, 856 F. Supp. at 807 ("In cases such as this, where a government employee asserts that he has been stigmatized in the course of a decision to terminate his employment, the Supreme Court has held that the process due is that which provides the terminated employee with a meaningful opportunity to clear his name.")

Moreover, this action resembles those cases where a government employee is defamed and stigmatized by comments made in connection with the termination of her employment. Such instances require a post-deprivation name-clearing hearing to satisfy due process. *See, e.g., Rivera II*, 2002 WL 1461407, at *7; *Rivera I*, 145 F. Supp. 2d at 307-308; *Federico*, 955 F. Supp. at 201-02; *Esposito*, 856 F. Supp. at 807.

Here, DiBlasio was afforded such a "name-clearing hearing" in the disciplinary hearing. *See* N.Y. Pub. Health Law § 230(12). In fact, as defendants stress, DiBlasio succeeded at clearing his name at that hearing and restored his license to practice medicine. (Hershler Decl. Ex. Order dated Jan. 25, 2001.) Thus, DiBlasio received adequate due process. *See Komlosi*, 64 F.3d at 817-18; *see also Esposito*, 856 F. Supp. at 807 ("[P]laintiff was entitled to a *post*-termination hearing. . . . 'Because [a hearing] is provided simply to cleanse the reputation of the claimant, the hearing need not take place prior to his termination or to the publication of related information adverse to his interests.'" (alteration in original) (quoting *Campbell v. Pierce County, Georgia*, 741 F.2d 1342, 1345 (1984)).

Moreover, DiBlasio also had the opportunity to file an Article 78 proceeding immediately after his deprivation. *See* N.Y. C.P.L.R. 7803 & 7805; *Gudema v. Nassau County,* 163 F.3d 717, 725 (2d Cir. 1998). An Article 78 proceeding in New York State courts qualifies as a constitutionally proper name-clearing hearing. *Rivera II,* 2002 WL 1461407, at *7 (where state provided opportunity to clear claimant's name through an Article 78 proceeding due process rights were not violated); *Ryan v. Carroll,* 67 F. Supp. 2d 356, 361-62 (S.D.N.Y. 1999) ("Indeed, Article 78 proceedings have been held to be adequate post-deprivation procedures, and they frequently function as name clearing hearings."); *see also Locurto v. Safir,* 264 F.3d 154, 175 (2d Cir. 2001) ("An Article 78 proceeding therefore constitutes a wholly adequate post-deprivation hearing for due process purposes."); *Gudema,* 163 F.3d at 725 (Article 78 proceeding is meaningful postdeprivation remedy and thus no due process violation where deprivation was through random and unauthorized act of official).

Accordingly, DiBlasio's "stigma-plus" cause of action must be dismissed.

V. *The Unconstitutional Disclosure of Information Claim*

In the seventh cause of action in the Complaint, DiBlasio alleges that Novello's comments disclosed information outside the scope of the summary suspension order and thus violated Section 230. DiBlasio alleges that those statements deprived him of his property and liberty interests in the confidentiality of Section 230 without due process of law. (Am. Compl. ¶¶ 196-202.) Moreover, DiBlasio alleges that

the "purpose of the confidentiality statute was to protect physicians from undue harm to reputation because of ongoing proceedings, to prevent the danger of misreporting information related to [DiBlasio] in the investigation, and to preserve due process and fundamental fairness to physicians involved in disciplinary proceedings." (Am. Compl. ¶ 115.) This claim reiterates the stigma-plus claim previously discussed. Accordingly, the post-deprivation hearing afforded DiBlasio the process that was due, and therefore this cause of action is dismissed.

VI. *State Claims*

As a result of the dismissal of all of DiBlasio's federal causes of action, this Court declines to exercise its supplemental jurisdiction over DiBlasio's state causes of action. 28 U.S.C. § 1367(c)(3); *Travelers Ins. Co. v. Keeling*, 996 F.2d 1485, 1490 (2d Cir. 1993); *Gotbetter v. Port Authority of New York and New Jersey*, No. 98 Civ. 6762 (WHP), 2000 WL 328044, at *6 (S.D.N.Y. Mar. 28, 2000).

Conclusion

Defendants' motion to dismiss the Amended Complaint is granted. The federal causes of action set forth in counts three-five, seven, nine, eleven, thirteen and fifteen are dismissed with prejudice. The remaining state causes of action are dismissed without prejudice. The Clerk of the court is directed to close this case.

Appendix B

Dated: September 27, 2002
New York, New York

SO ORDERED:

s/ William H. Pauley
WILLIAM H. PAULEY III
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 6, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Court House
40 Foley Square
New York 10007

Roseann B. MacKechnie
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of two thousand two.

Present:

Hon. John M. Walker, Jr., Chief Judge

Hon. Roger J. Miner,

Hon. Pierre N. Leval,

CIRCUIT JUDGES

Appendix C

Docket No. 02-9298

DiBlasio

Plaintiff-Appellant

v.

Novello

Defendant-Appellee

A petition for panel rehearing having been filed herein by Appellee Antonia C. Novello,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: s/ Laura Bass Penn
Laura Bass Penn
Motions Staff Attorney

APPENDIX D — STATUTES INVOLVED

§ 230. State board for professional medical conduct; proceedings

1. A state board for professional medical conduct is hereby created in the department in matters of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Its physician members shall be appointed by the commissioner at least eighty-five percent of whom shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide specialty societies recognized by the council of medical specialty societies, and the hospital association of New York state. Its lay members shall be appointed by the commissioner with the approval of the governor. The board of regents shall also appoint twenty percent of the members of the board. Not less than sixty-seven percent of the members appointed by the board of regents shall be physicians. Not less than eighty-five percent of the physician members appointed by the board of regents shall be from among nominations submitted by the medical society of the state of New York, the New York state osteopathic society, the New York academy of medicine, county medical societies, statewide medical societies recognized by the council of medical specialty societies, and the hospital association of New York state. Any failure to meet the percentage thresholds stated in this subdivision

shall not be grounds for invalidating any action by or on authority of the board for professional medical conduct or a committee or a member thereof. The board for professional medical conduct shall consist of not fewer than eighteen physicians licensed in the state for at least five years, two of whom shall be doctors of osteopathy, not fewer than two of whom shall be physicians who dedicate a significant portion of their practice to the use of non-conventional medical treatments who may be nominated by New York state medical associations dedicated to the advancement of such treatments, at least one of whom shall have expertise in palliative care, and not fewer than seven lay members. An executive secretary shall be appointed by the chairperson and shall be a licensed physician. Such executive secretary shall not be a member of the board, shall hold office at the pleasure of, and shall have the powers and duties assigned and the annual salary fixed by, the chairperson. The chairperson shall also assign such secretaries or other persons to the board as are necessary.

2. Members of such board shall be appointed by the commissioner or the board of regents for three year terms except that the terms of those first appointed shall be arranged so that as nearly as possible an equal number shall terminate annually. A vacancy occurring during a term shall be filled by an appointment by the commissioner or the board of regents for the unexpired term.

Appendix D

3. Each member of the board shall receive a certificate of appointment, shall before beginning his term of office file a constitutional oath of office with the secretary of state, shall receive up to one hundred fifty dollars as prescribed by the commissioner for each day devoted to board work not to exceed ten thousand dollars in any one year, and shall be reimbursed for his necessary expenses. Any member may be removed from the board at the pleasure of the commissioner.

4. The governor shall annually designate from the members of the board a chairperson who shall be a physician and vice-chairperson. The board shall meet upon call of the chairperson, and may adopt bylaws consistent with this section. A quorum for the transaction of business by the board shall be a majority of members.

5. From among the members of the board two or more committees on professional conduct shall be appointed by the board chairperson.

6. Any committee on professional conduct appointed pursuant to the provisions of this section shall consist of two physicians and one lay member.

7. The board, by its committees on professional conduct, shall conduct disciplinary proceedings as prescribed in this section and shall assist in other professional conduct matters as prescribed

by the chairperson. In this section the term "licensee" shall mean physician, including a physician practicing under a limited permit, a medical resident, physician's assistant and specialist's assistant. A committee on professional conduct, on notice to the licensee and after affording the licensee, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a licensee to submit to a medical or psychiatric examination when the committee has reason to believe the licensee may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the licensee and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the licensee, and the office of professional medical conduct. The licensee may also obtain a physician to conduct an examination the results of which shall be provided to the committee and the office of professional medical conduct.

8. Notwithstanding any other provision of law, no member of a committee on professional conduct nor an employee of the board shall be liable in damages to any person for any action taken or recommendation made by him within the scope of his function as a member of such committee or employee provided that (a) such member or employee has taken action or made

recommendations within the scope of his function and without malice, and (b) in the reasonable belief after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed.

9. Notwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.

9-a. At any time, if the board for professional medical conduct or the office of professional medical conduct determines that there is a reasonable belief that a criminal offense has been committed by the licensee, the board for professional medical conduct or office of professional medical conduct shall notify the appropriate district attorney.

10. Professional misconduct proceedings shall consist of:

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(a) [Amendment eff. until March 31, 2008, pursuant to L.1983, c. 426, § 5.] Investigation. (i) The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. The director of the office of professional medical conduct shall cause a preliminary review of every report made to the department pursuant to section twenty-eight hundred three-e as added by chapter eight hundred sixty-six of the laws of nineteen hundred eighty, sections twenty-eight hundred five-l and forty-four hundred five-b of this chapter, and section three hundred fifteen of the insurance law, to determine if such report reasonably appears to reflect physician conduct warranting further investigation pursuant to this subparagraph.

(ii) If the investigation of cases referred to an investigation committee involves issues of clinical practice, medical experts, shall be consulted. Experts may be made available by the state medical society of the state of New York, by county medical societies and specialty societies, and by New York state medical associations dedicated to the advancement of non-conventional medical treatments. Any information obtained by

medical experts in consultations, including the names of licensees or patients, shall be confidential and shall not be disclosed except as otherwise authorized or required by law.

(iii) In the investigation of cases referred to an investigation committee, the licensee being investigated shall have an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation. The licensee may have counsel present. Providing an opportunity for such an interview shall be a condition precedent to the convening of an investigation committee on professional misconduct of the board for professional medical conduct. Within ninety days of any interview of the licensee, an investigation committee on professional conduct of the board of professional medical conduct shall be convened. The licensee shall be given written notice of issues identified subsequent to the interview. The licensee may submit written comments or expert opinion to the office of professional medical conduct at any time.

(iv) If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of an investigation committee, and after consultation with the executive secretary, determines that a

hearing is warranted the director shall, within fifteen days thereafter, direct counsel to prepare the charges. If the director determines after consultation with an investigation committee that: (A) evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing or medical practice, or impairment by drugs, alcohol, physical or mental disability; (B) a recommendation was made by a county medical society or the medical society of the state of New York that warrants further review; or (C) the facts underlying a verdict in a medical malpractice action warrant further review, the director, in addition to the authority set forth in this section, shall be authorized to conduct a comprehensive review of patient records of the licensee and such office records of the licensee as are related to said determination. The licensee shall cooperate with the investigation and willful failure to cooperate in a substantial or material respect may result in an enforcement proceeding pursuant to subparagraph (ii) of paragraph (o) of this subdivision. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

(v) The files of the office of professional medical conduct relating to the investigation of possible instances of professional misconduct shall be confidential and not subject to disclosure at the request of any person, except as provided by law in a pending disciplinary action or proceeding. The provisions of this paragraph shall not prevent the office from sharing information concerning investigations within the department and, pursuant to subpoena, with other duly authorized public agencies responsible for professional regulation or criminal prosecution. Nothing in this subparagraph shall affect the duties of notification set forth in subdivision nine-a of this section.

(vi) The office of professional medical conduct, acting under this section, may have access to the criminal history record of any licensee governed by the provisions of this section maintained by the division of criminal justice services pursuant to subdivision six of section eight hundred thirty-seven of the executive law.

(b) Charges. The charges shall state the substance of the alleged professional misconduct and shall state clearly and concisely the material facts but not the evidence by which the charges are to be proved.

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(c) Notice of hearing. The board shall set the time and place of the hearing. The notice of hearing shall state (1) the date, time and place of the hearing, (2) that the licensee shall file a written answer to each of the charges and allegations in the statement of charges no later than ten days prior to the hearing, that any charge and allegation not so answered shall be deemed admitted and that the licensee may wish to seek the advice of counsel prior to filing such answer, (3) that the licensee shall appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules or either party may issue such subpoenas in their own behalf, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the committee.

(d) Service of charges and of notice of hearing. A copy of the charges and the notice of the hearing shall be served on the licensee personally by the board at least twenty days before the hearing. If personal service cannot be made after due diligence and such fact is

certified under oath, a copy of the charges and the notice of hearing shall be served by registered or certified mail to the licensee's last known address by the board at least fifteen days before the hearing.

(e) Committee hearing. The hearing shall be conducted by a committee on professional conduct. The members of the hearing committee shall be appointed by the chairperson of the board who shall designate the committee chairperson. In addition to said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, including motions to compel disclosure of information or material claimed to be protected because of privilege or confidentiality, procedures and other legal objections and shall draft the conclusions of the hearing committee pursuant to paragraph (g). The administrative officer shall have the authority to rule on objections to questions posed by either party or the committee members. The administrative officer shall not be entitled to vote.

(f) Conduct of hearing. All hearings must be commenced within sixty days of the service of charges except that an adjournment of the initial hearing date may be granted by

the hearing committee upon request by either party upon good cause shown. No adjournment shall exceed thirty days. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision) and in section four hundred one of the state administrative procedure act. The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairperson of the board. The member shall affirm in writing that he or she has read and considered evidence and transcripts of the prior proceedings. The last hearing day must be held within one hundred twenty days of the first hearing day. Either party, for good cause shown, may request that the committee extend the last hearing day beyond one hundred twenty days. An extension requested by the licensee and granted by the committee may not be used as the grounds for a proceeding brought under paragraph (j) of this subdivision.

(g) Results of hearing. The committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, and (3) a determination regarding charges sustained or dismissed, and in the event any of the charges have been sustained, of the penalty to be imposed or appropriate action to be taken and the reasons for the determination. For the committee to make a conclusion sustaining a charge, or determining a penalty or the appropriate action to be taken, two members of the committee must vote for such a conclusion or determination. The committee shall issue an order based on its determination. The committee's findings, conclusions, determinations and order shall become public upon issuance in any case in which annulment, suspension without stay or revocation of the licensee's license is ordered.

(h) Disposition of results. The findings, conclusions, determination and the reasons for the determination of the committee shall be served upon the licensee, the department, and any hospitals, primary practice settings or health care plans required to be identified in publicly disseminated physician data pursuant to paragraph (j), (n), or (g) of subdivision one of section twenty-nine hundred ninety-five-a of this chapter, within sixty days of the last day of hearing. Service shall be either by certified mail upon the

licensee at the licensee's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The licensee shall deliver to the board the license which has been revoked, annulled, suspended or surrendered, together with the registration certificate, within five days after receipt of the order. If the license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, the licensee shall submit an affidavit to that effect and shall deliver such license or certificate to the board when located. The director of the office shall promptly transmit a copy of the order to the division of professional licensing services of the state education department and to each hospital at which the licensee has privileges.

(i) The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by the administrative review board for professional medical conduct.

(j) Time limitations. Failure to comply with a provision of this subdivision requiring that a specified action shall be taken within a specified period of time shall be grounds for a proceeding pursuant to article seventy-eight

of the civil practice law and rules for an order staying the hearing or dismissing the charges or any part thereof or any other appropriate relief. Such proceeding shall be returnable before the supreme court of Albany county or New York county. The respondent in such proceeding shall have the initial burden to explain the reasons for the failure to comply with a provision of this subdivision requiring that a specified action to be taken within a specified period of time. The court shall not stay the hearing or dismiss the charges or grant any other relief unless it determines that failure to comply was not caused by the article seventy-eight petitioner and has caused substantial prejudice to the article seventy-eight petitioner.

(k) The executive secretary of the board with the specific approval of a committee on professional conduct of the board shall have the power to issue subpoenas requiring persons to appear before the board and be examined with reference to a matter within the scope of the inquiry or the investigation being conducted by the board and produce books, papers, records or documents pertaining thereto.

(l) The board or its representatives may examine and obtain records of patients in any investigation or proceeding by the board

acting within the scope of its authorization. Unless expressly waived by the patient, any information so obtained shall be confidential and shall not be disclosed except to the extent necessary for the proper function of the board and the name of the patient may not be disclosed by the board or its employees at any stage of the proceedings unless the patient has expressly consented. Any other use or dissemination by any person by any means, unless pursuant to a valid court order or otherwise provided by law, is prohibited.

* * *

12. Summary action. (a) Whenever the commissioner, after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct, based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section, the commissioner may order the licensee, by written notice, to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service

of the order. Within ten days from the date of service of the said order, the state board for professional medical conduct shall commence and regularly schedule such hearing proceedings as required by this section, provided, however, that the hearing shall be completed within ninety days of the date of service of the order. To the extent that the issue of imminent danger can be proven without the attorney representing the office of professional medical conduct putting in its entire case, the committee of the board shall first determine whether by a preponderance of the evidence the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people. The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the licensee's condition, activity or practice constitutes an imminent danger to the health of the people. The licensee shall have an opportunity to be heard and to present proof. When both the office and the licensee have completed their cases with respect to the question of imminent danger, the committee shall promptly make a recommendation to the commissioner on the issue of imminent danger and determine whether the summary order should be left in effect, modified or vacated, and continue the hearing on all the remaining charges, if any, in accordance with paragraph (f) of subdivision ten of this section. Within ten days of

the committee's recommendation, the commissioner shall determine whether or not to adopt the committee's recommendations, in whole or in part, and shall leave in effect, modify or vacate his summary order. The state board for professional medical conduct shall make every reasonable effort to avoid any delay in completing and determining such proceedings. If, at the conclusion of the hearing, (i) the hearing committee of the board finds the licensee guilty of one or more of the charges which are the basis for the summary order, (ii) the hearing committee determines that the summary order continue, and (iii) the ninety day term of the order has not expired, the summary order shall remain in full force and effect until a final decision has been rendered by the committee or, if review is sought, by the administrative review board. A summary order shall be public upon issuance.

(b) When a licensee has pleaded or been found guilty or convicted of committing an act constituting a felony under New York state law or federal law, or the law of another jurisdiction which, if committed within this state, would have constituted a felony under New York state law, or when the duly authorized professional disciplinary agency of another jurisdiction has made a finding substantially equivalent to a finding that the practice of medicine by the licensee in that jurisdiction constitutes an imminent danger to the health of its people, or when a licensee has been disciplined by a duly authorized professional

disciplinary agency of another jurisdiction for acts which if committed in this state would have constituted the basis for summary action by the commissioner pursuant to paragraph (a) of this subdivision, the commissioner, after a recommendation by a committee of professional conduct of the state board for professional medical conduct, may order the licensee, by written notice, to discontinue or refrain from practicing medicine in whole or in part or to take certain actions authorized pursuant to this title immediately. The order of the commissioner shall constitute summary action against the licensee and become public upon issuance. The summary suspension shall remain in effect until the final conclusion of a hearing which shall commence within ninety days of the date of service of the commissioner's order, end within ninety days thereafter and otherwise be held in accordance with paragraph (a) of this subdivision, provided, however, that when the commissioner's order is based upon a finding substantially equivalent to a finding that the practice of medicine by the licensee in another jurisdiction constitutes an imminent danger to the health of its people, the hearing shall commence within thirty days after the disciplinary proceedings in that jurisdiction are finally concluded.

* * *

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§ 230-c. Administrative review board for professional medical conduct

1. There is hereby created an administrative review board for professional medical conduct for the purpose of reviewing determinations of committees on professional conduct of the state board for professional medical conduct. The review board may not review a commissioner's summary order under subdivision twelve of section two hundred thirty of this title.

2. The review board shall consist of five members of the board appointed by the governor with the consent of the senate. Three of the members of the review board shall be physicians from the board for professional medical conduct. Two of the members of the review board shall be lay members from the board for professional medical conduct. The chairperson shall assign appropriate staff to assist the review board.

3. All members shall serve three year terms, provided that two of the initial appointments shall serve for a term of two years and one of the initial appointments shall serve for one year.

4. Filing and determination of review. (a) The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by the administrative review board for professional medical conduct. Either the licensee or the department may seek a

review. A notice of review must be served by certified mail upon the administrative review board and the adverse party within fourteen days of service of the determination of the committee on professional conduct of the state board for professional medical conduct. A commissioner's summary order under subdivision twelve of section two hundred thirty of this title and the penalty in any case in which annulment, suspension without stay or revocation of the licensee's license is ordered by the committee on professional conduct shall remain in effect until the review board renders its determination. Any penalty imposed by the order of the committee on professional medical conduct, other than a penalty of annulment, suspension without stay or revocation, is stayed by the service of the notice of review upon the administrative review board and remains stayed until the review board renders its determination. All parties have thirty days from the service of the notice of review to submit briefs to the board. A notice of review shall be perfected only if a brief is timely submitted. All parties shall have seven days from the receipt of the submitted brief to file a response. All reviews shall consist of a review of the record of the hearing and submitted briefs only. A written determination of the review board must be rendered within forty-five days of the submission of briefs and a stipulated record.

(b) The review board shall review whether or not the determination and the penalty

are consistent with the findings of fact and conclusions of law and whether or not the penalty is appropriate and within the scope of penalties permitted by section two hundred thirty-a of this title. The review board shall have the authority to remand a case to the committee on professional conduct for reconsideration or further proceedings.

(c) All determinations shall be based upon a majority concurrence of the administrative review board.

(d) The administrative review board shall issue an order based upon the determination of the administrative review board. Such order shall be served on all parties by certified mail.

5. Judicial review. An order of the administrative review board for professional medical conduct or a determination of a committee in which no review by the administrative review board was requested may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceeding shall be returnable before the appellate division of the third judicial department and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the department and to the attorney general and upon a showing that the petitioner has a substantial likelihood of success. Failure to seek an order of the administrative review board shall not be grounds for dismissal of such a proceeding.

(2)

No. 03-1137

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, PETITIONER

v.

MARIO DIBLASIO, M.D. AND MARIO DIBLASIO, M.D., P.C., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly decided: (1) that the summary suspension procedure set forth under New York Public Health Law §230(12)(a) did not share enough of the characteristics of the judicial process as outlined in this Court's decision in *Butz v. Economou* to entitle Petitioner to absolute immunity from suit; and (2) that the New York State Commissioner of Health was not functioning in a manner sufficiently analogous to a prosecutor or judge in the investigation and ultimately the summary suspension of Respondent's medical license?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellee in the court below, is Antonio C. Novello ("Petitioner") in her individual capacity. Defendant-Appellee in the court below, Lisa Hampton, is not a petitioner in this action.

Respondents are Mario DiBlasio, M.D. and Mario DiBlasio, M.D., P.C ("Dr. DiBlasio").

CORPORATE DISCLOSURE STATEMENT

Respondent Mario DiBlasio, M.D. is an individual who resides at 385 McLean Avenue, Apartment 12G, Yonkers, New York 10705. Respondent Mario DiBlasio, M.D., P.C. is a professional corporation organized and existing under the laws of the State of New York.

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STATEMENT OF THE CASE

A. Introduction

There is no conflict among the circuit courts of appeals in deciding cases where state officials involved in summary disciplinary proceedings of physicians are claiming absolute immunity from suit. The Second Circuit did not depart from the decisions of this Court or other courts of appeal when it analyzed and rejected the claim of absolute immunity by the New York State Commissioner of Health. **Every** case decided by this Court and by the circuit courts weighs the six factors outlined in *Butz v. Economou* and reviews the state law procedures at issue to determine whether they are sufficiently similar to a judicial proceeding to warrant absolute immunity. 438 U.S. 478, 512 (1978). **Every** case decided by this Court and by the circuit courts turns on the factual issues presented including, *inter alia,* analysis of the role(s) of the public official at issue and whether procedural safeguards exist under the particular state statutory scheme to adequately protect against unconstitutional conduct.

After a detailed and careful review of the *Butz* factors and application to the facts and state law procedures in this case, the Second Circuit correctly concluded that "the summary procedures provided in § 230 are insufficiently similar to a judicial proceeding to warrant absolute immunity, and . . . [the Commissioner of Health's] . . . role in the summary suspension was [not] 'functionally comparable' to that of a judge or prosecutor" (App. 18a).

Any attempt by Petitioner to create an illusory conflict between the Second Circuit and this Court as well as other circuit courts cannot withstand scrutiny and should not be the basis for granting this petition. The summary suspension procedure at issue in this action was determined by the Second Circuit to "inadequately protect physicians from

wrongful deprivation of their professional 'licences'" (App. 12a). Indeed the statute was found to give the commissioner "virtually unfettered authority to determine whether a physician's license should be summarily suspended" and thereby seriously undermined the efficacy of the limited procedural safeguards afforded a physician under § 230 of the New York Public Health Law ("PHL") (App. 13a). The so called "conflict" between the circuits is not a conflict, but rather the result of circuit courts consistently and uniformly applying the six *Butz* factors to different state statutory schemes and examining the conduct, roles and functions of different state officials operating under these various and different state laws. Any divergence in rulings in the few instances where circuit courts have applied absolute immunity analysis to summary medical disciplinary procedures, results from significant differences in the statutory procedures in those states and the roles of the different officials against whom claims were made. In each instance the circuit courts have properly applied the *Butz* factors. Not surprisingly, significant differences in the summary suspension procedures exist from state to state. Given these differences, as is to be expected, even the few circuit courts which have completed a *Butz* analysis have reached different outcomes. Furthermore, each and every case cited by Petitioner as being in conflict with this Second Circuit decision is limited to granting immunity to members or directors of the medical board adjudicating the suspension or the board's counsel. Immunity is not extended beyond those participants.

It is important to note that Petitioner is only appealing from that portion of the Second Circuit's ruling relating to absolute immunity. Those portions of the Second Circuit decision for which a petition for a writ of certiorari has **not** been requested include, *inter alia,* the finding that Petitioner's defamatory statements made during press conferences were not 'random and unauthorized acts' and, as

a result, Dr. DiBlasio properly alleged a "stigma plus" due process violation; the finding that Dr. DiBlasio's due process claims were not barred under the *Rooker-Feldman* doctrine; the finding that Defendant Hampton was not entitled to absolute immunity; and the finding that Dr. DiBlasio's state law claims were erroneously dismissed by the lower court. Thus, the remainder of this action has been properly remanded and will proceed before the district court. Although Respondent firmly believes that he will prevail on all matters remanded to the district court, the fact that Petitioner can successfully seek to defend all of the claims at issue on the merits should persuade this Court that this case is not worthy of certiorari review. Respondent emphatically believes that such petition should be denied in that this is an interlocutory appeal of a single issue in an ongoing case.

As there has been no discovery allowed in this action to date, there are numerous unresolved contentious factual disputes between the parties relating to Petitioner's activities which were not summarized in the petition for certiorari. These disputed factual issues have a direct bearing on the absolute immunity issue. The nature of Petitioner's involvement is far broader than the facts noted in the petition and includes investigative misconduct occurring prior to Dr. DiBlasio even being considered for misconduct charges, before any probable cause existed and, therefore, before absolute immunity could possibly attach. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 274 (1993). These omitted facts include: (1) Petitioner's inappropriate influence over the State's sole medical investigator resulting in admitted bias (JA 193-95, 199-202)[1]; (2) Petitioner's decision to order summary suspension without satisfying the first statutory

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[1] References to "JA" refer to the Joint Appendix submitted to the Second Circuit upon Respondent's appeal of the district court decision.

condition precedent that Respondent be given an interview with counsel present, notice and a meaningful opportunity to explain the issues under investigation; (3) Petitioner's decision to order summary suspension without satisfying the second statutory condition precedent that an investigative committee make a finding or recommendation that Respondent's continued medical practice poses an imminent danger; and, further (4) Petitioner's defamatory and stigmatizing comments concerning Dr. DiBlasio's suspension made during several press conferences and press releases (JA 59-76) in violation of statutory requirements to maintain strict confidentiality with regard to physician disciplinary proceedings (with the sole exception that the summary order be made public). Indeed, during the press conferences Petitioner's remarks included false accusations that Dr. DiBlasio was responsible for the possible deaths of innocent women and that he might be criminally prosecuted. These disparaging remarks, which could only serve to sabotage Dr. DiBlasio's career, were duly acknowledged by the Second Circuit in its decision to reverse the district court's decision and remand the case for further proceedings. (App. 4a). Petitioner does **not** claim absolute immunity from the claims involving her press statements.[2]

B. Factual Background

1. Statutory Framework

When a doctor is suspected of possible professional misconduct, § 230 of the PHL governs the physician disciplinary proceedings concerning such suspected misconduct and establishes the conditions under which a

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[2]Nor could Petitioner properly claim such immunity. *See Buckley,* 509 U.S. at 278; *Butz,* 438 U.S. 478, 489 (1978).

physician's license can be suspended. *See* §§ 230(10) & 12(a). § 230 also contains procedures whereby a physician's license can be summarily suspended before a full investigation and hearing is conducted. *See* §230(12)(a).

However, § 230(12)(a) allows the commissioner of the DOH to summarily suspend a physician's license if, "after an investigation and a recommendation by [the investigative committee], based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's **opinion** constitutes an imminent danger . . . that it therefore appears to be prejudicial . . . to delay action until an opportunity for a hearing can be provided." § 230(12)(a) (emphasis added). Section 230(12) of the PHL allows for a summary order to be made public upon issuance. After a summary order issues, the Board must commence a hearing proceeding within ten days and to be completed within ninety days to determine whether by a preponderance of the evidence, the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger. *See id.* However, the commissioner may, as she did in this case, ignore any such recommendation of the investigative committee and leave the summary order in effect even where the investigative committee fails to find imminent danger. *See id.* Under § 230-c, an administrative review board for professional medical conduct is created for the purpose of reviewing determinations of the investigative committee. However, this administrative review board **cannot** review, modify or reverse a commissioner's summary order. § 230-c.1.

The net effect of this statutory scheme is that the post-deprivation hearing before the Board's hearing committee provides no real check on the commissioner's actions in summarily suspending a physician. The statute first allows the commissioner to summarily suspend a physician's license based upon little or no evidence at all - - the only benchmark used is whether in her opinion the physician's activities

constitute an imminent danger. The statute then calls for a hearing by the state board for professional conduct including an interim determination on the continuation of the suspension. However, regardless of the determination reached during this hearing, the statute allows the commissioner to reject the hearing committee's recommendation that the summary suspension be lifted based solely upon her "opinion" and the power afforded by her position. The commissioner's summary suspension order is not reviewable by the review board, nor through any other administrative board, agency or department.

2. Facts Material to the Consideration of the Question Presented

Dr. DiBlasio brought this action against Defendants Novello, Hampton and the New York State Department of Health ("DOH") based on the DOH's investigation of Dr. DiBlasio and the resulting summary suspension of his license. (JA 7-58). The investigation of Dr. DiBlasio was conducted when Dr. DiBlasio was an independent contractor for Bier, P.C., a contractor providing mammography readings and subsidized breast cancer screening and education.

The investigation began with the billing practices of Dr. Bier, billing practices in which Dr. DiBlasio had no involvement. The alleged billing irregularities by Dr. Bier, combined with the possible negligent medical treatment of a vulnerable, under-served minority patient population, quickly identified this investigation as having possible widespread media appeal. It is alleged that Petitioner directed the investigation to ensure a pre-ordained outcome of summary suspension, news conferences and headline stories on television and print media.

The procedural safeguards set forth in Section B.I, *supra,* evaluated by both the District Court and Second Circuit to be limited at best, did not provide minimum due

process protections. (App. 12a - 16a, 60a). In fact, Dr. DiBlasio was denied even those very limited procedural safeguards required under New York law. Dr. DiBlasio's statutory right, under PHL 230(10)(a)(iii), to be given meaningful written notice of the issues involved in the investigation, the right to provide an explanation of the issues under investigation, the right to have counsel present, and the right to submit written comments and/or expert opinion to the Office of Professional Medical Conduct ("OPMC") were systematically subverted by Petitioner during each phase of the investigation leading up to the summary suspension process.

Dr. DiBlasio was given last minute verbal notice of the meeting, making it impossible for him to retain counsel and prepare for the interview. Dr. DiBlasio was not told that he was under investigation or the issues under review. Dr. DiBlasio was not told that he could have a lawyer present, nor given any meaningful opportunity to submit evidence or expert opinion prior to being deprived of his medical license.

The written notice belatedly received by Dr. DiBlasio was untimely and inadequate - - it was provided to him on a weekend, less than one business day before he was required to attend a meeting several hours from his home on the morning of Monday, May 22, 2000. The only issue stated in the "notice" letter was Dr. DiBlasio's treatment of fifty patients without any reference to any issues relating to those fifty patients. Dr. DiBlasio was not given access to the relevant medical records or a meaningful opportunity to seek legal or professional expert assistance.

Not only were the clinical issues under investigation left undefined, but the belated notice given to Dr. DiBlasio was deliberately mischaracterized as a "form letter" in a deliberate attempt to minimize the significance of the investigation. The written notice failed to mention either of the two issues under investigation and even at the "interview" held on May 22nd, Dr. DiBlasio was still not advised of either

of these issues.

Dr. DiBlasio was deliberately deceived about the significance of the May 22nd interview, was told that he was not a target of the investigation and told that the purpose of the interview was to simply confirm whether or not he had read certain mammograms. (JA 290-91, 293). The pretense given for the interview was that Dr. Bier was reportedly claiming for the first time that Dr. DiBlasio had read these films. Dr. DiBlasio was advised not to be concerned since the OPMC knew he was not involved in billing matters. Thus, Dr. DiBlasio was misled into appearing at a pretextual meeting on extremely short notice, unprepared and without counsel. This made it appear as though Dr. DiBlasio was afforded the investigative "interview" required under the PHL, an interview which is a condition precedent to the convening of an investigative committee where possible charges would be considered.

As noted *supra*, the investigation conducted by the DOH was tainted with improprieties from its inception. These improprieties included a statistical and clinical investigation wherein the investigator intentionally ignored the known data anomaly which leads to low breast cancer detection rates and skewed the "representative" statistical sample by allowing Dr. Bier, himself the subject of a DOH investigation, to select a majority of the patient files comprising the "representative" sample. The State's sole medical investigator, Dr. Silk, was fed inappropriate information to such an extent that he admitted under oath that he was biased based on comments indicating that Petitioner, the commissioner of the DOH, had a "tremendous interest" in the outcome of this investigation and similar damaging comments that one of his well-respected colleagues had found evidence that Dr. DiBlasio was responsible for a "big missed cancer." (JA 193-95, 199-202). These comments improperly led Dr. Silk to falsely form the conclusion in the draft report submitted to the investigative committee that Dr.

DiBlasio had failed to detect a large cancer and had negligently misinterpreted mammograms. (JA 178, 191, 194-95, 196, 199-202, 224-27, 228-29). Finally, under Petitioner's direction the DOH suppressed the preparation of Dr. Silk's final report after Dr. Silk learned that repeat mammograms had been given to all of the women being studied and in **each and every case** Dr. DiBlasio's medical findings had been correct. (JA 238-39). If preparation of a final report had not been suppressed, many of the false accusations in the draft report, including the missed cancer claim, would have undoubtedly been withdrawn by Dr. Silk before the case was ever submitted to the investigative committee and the fact that repeat mammograms had confirmed Dr. DiBlasio diagnosis as correct in each and every case would have come to light.

The case against Dr. DiBlasio was presented jointly with the case against Dr. Bier to the investigative committee, although all of the inflammatory charges of billing fraud against Dr. Bier were unrelated to Dr. DiBlasio. The case transmittal form of the joint case against Drs. Bier and DiBlasio was entitled "FRAUDULENT PRACTICE, NEGLIGENCE AND INCOMPETENCE" and "FRAUDULENT PRACTICE-OTHER." This captioning was unduly prejudicial and unfair to Dr. DiBlasio, when it was already known that he was not involved in the billing issues giving rise to the fraudulent practice claim. (JA 339).

The report contains no allegation of imminent danger against Dr. DiBlasio by Dr. Silk; allegations of imminent danger are only alleged against Dr. Bier. (JA 340). As a result, Dr. DiBlasio has alleged, upon information and belief, that no competent evidence of imminent danger was submitted against him and no recommendation of imminent danger was actually made by the investigative committee against him. Hence, it is alleged that Petitioner did not act to suspend Dr. DiBlasio based upon a recommendation of the investigative committee as required by law, but based solely

upon her administrative power to do so.

Moreover, although exigent circumstances are required in order to invoke the summary suspension procedures, numerous facts known to Petitioner demonstrate that no emergency existed. As early as March 22, 2000, DOH was well aware that most cases of low breast cancer detection statistics revolved around miscoding of forms or misinterpretation of its requests for data, and were not indicative of genuine clinical problems. (JA 365). Yet, the decision was made not to investigate whether these clerical errors had occurred at Bier, P.C. To further negate any reliance on exigent circumstances, it was also known that Dr. Silk had ultimately agreed with and independently confirmed through retake mammographies that Dr. DiBlasio's diagnosis was correct in all of the fifty patients identified by the DOH. (JA 206, 208).

Instead of simply making the summary order public, as allowed by the statute, Petitioner called and held at least two press conferences and issued several press releases making defamatory and stigmatizing statements concerning Dr. DiBlasio's medical practice. The defamatory statements made by Petitioner went far beyond the scope of her duties as commissioner and were in direct violation of a statute that requires that pending physician disciplinary proceedings remain strictly confidential until due process adversarial hearings are concluded and then only if the physician is ultimately disciplined. Only the summary **order** is to be made public. *See* PHL § 230(12)(a). Unproven allegations against a physician must remain confidential. *See* PHL § 230(10)(g). Despite these unequivocal statutory prohibitions, Petitioner called two press conferences at which she made false and defamatory statements. These statements: (1) described the circumstances and unproven factual allegations surrounding the ongoing investigation; (2) falsely suggested that Dr. DiBlasio committed fraud; (3) falsely stated that Dr. DiBlasio was an unjustly enriched thief; (4) falsely stated that

he was responsible for the possible deaths of innocent women; and (5) stated that he should be or might be criminally prosecuted. These statements caused permanent damage to Dr. DiBlasio's reputation.

REASONS FOR DENYING THE PETITION

I. The Second Circuit is in Accord with Rulings of this Court and Other Courts of Appeals

This decision by the Second Circuit does not conflict with either this Court or other circuits where a similar absolute immunity issue has been decided. None of the courts or decisions noted by Petitioner address the same or even remotely similar summary suspension powers afforded to the commissioner under New York State Public Health Law or a defendant who had responsibilities identical to this commissioner. Instead, the other circuits have decided upon facts significantly different from those now before this Court -- the statutes analyzed by the other circuits have been found to contain adequate procedural safeguards to protect against unconstitutional conduct. The finding of absolute immunity has been reserved **only** for members of the medical board and physicians who served on hearing committees to review evidence presented and thus have duties intimately associated with the judicial process.[3] Neither this Court nor any other

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[3] *See e.g., Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 702 (1st Cir. 1995) (extending absolute immunity only to Board members and its counsel); *Watts v. Burkhart*, 978 F.2d 269, 278 (6th Cir. 1992) (en banc) (extending absolute immunity to physician members of the Board upon finding that their positions are akin to that of judges and enough safeguards exist to protect a physician's constitutional rights); *Dunham v. Wadley*, 195 F.3d 1007, 1010-11 (8th Cir.), *cert. denied* 531 U.S. 819 (2000) (extending absolute immunity only to members of the Board); *Mishler v. Clift*, 191 F.3d 998, 1008-09 (9th Cir. 1999) (granting absolute immunity only to the Board members for acts "closely associated with the judicial process" but denying absolute

circuit has categorically granted absolute immunity to a commissioner who could be classified as "overseer of the investigation", "initiator of charges", and "final arbiter of the decision to impose and sustain the summary suspension". (App 16a).

Absolute immunity, which the Supreme Court has been "quite sparing" in recognizing, applies to officials performing "special functions" which, because of their similarity to functions which would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability. *Buckley,* 509 U.S. at 268-69. When determining whether the immunity is qualified or absolute, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect [most] government officials in the exercise of their duties." *Burns v. Reed,* 500 U.S. 478, 486, 87 (1991).

Absolute immunity is accorded to judges and prosecutors functioning in their official capacities; absolute immunity is also extended, under certain circumstances, to officials of government agencies who perform certain functions analogous to those of a judge. *Butz,* 438 U.S. at 515. Six non-exhaustive factors are considered when determining whether the non-judicial officers functions share the characteristics of a judicial function. These factors are:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling

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immunity for actions falling outside the protections of absolute immunity); *Horwitz v. Board of Medical Examiners of State of Colorado*, 822 F.2d 1508, 1515 (10th Cir. 1987) (holding that members of the State Board of Medical Examiners are entitled to absolute immunity based on the prosecutorial role served and finding their duties functionally comparable to a court of law).

> unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of the error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

The Supreme Court has held that absolute immunity is appropriate when an official's functions are similar to those in the judicial process, *see Butz*, 438 U.S. at 512-13, an official's actions are likely to result in litigation, *see id.* at 515, and sufficient safeguards exist in the regulatory framework to control unconstitutional conduct. *See id.* at 512.

The Second Circuit reviewed the nature of Petitioner's responsibilities in determining the appropriateness of absolute immunity; the court could not merely rely upon Petitioner's title and stature within the DOH. None of the other circuit decisions noted by Petitioner extended absolute immunity beyond members of the medical board, directors of the board and its counsel, whose acts were closely associated with the judicial process. Petitioner in this case does not fall within these narrowly drawn categories.

In *Ostrzenski v. Seigel*, 177 F.3d 245, 251-52 (4th Cir. 1999), a case cited by Petitioner, a medical doctor brought a suit against another doctor who conducted a peer review of Ostrzenski at the behest of the Medical Board of Physician Quality Assurance. After carefully analyzing the Maryland Medical Practice Act which governs the licensing and disciplining of physicians in Maryland, the Fourth Circuit noted that the Act contained "adequate procedural safeguards" to specifically protect physicians against unconstitutional conduct by peer reviewers and that the specific functions performed by the defendant were analogous to that of a prosecutor. *Id.* at 251.

There are no such adequate procedural safeguards in the PHL to protect against unconstitutional conduct by the commissioner in the provisions related to the summary suspension procedures under § 230(12). Indeed, the Second Circuit held that "§ 230 inadequately protects physicians from wrongful deprivation of their professional licenses." (App. 12a). The Second Circuit correctly noted that although § 230 of the PHL provides some protections during the summary suspension process, "the efficacy of those procedures are seriously diminished by other features of § 230." (App. 12a). Moreover, after analyzing the protections afforded to physicians, the Second Circuit determined that the commissioner "has virtually unfettered authority to determine whether a physician's license should be summarily suspended." (App. 13a). *See also Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999) (granting absolute immunity only to Medical Board members for acts "closely associated with the judicial process" and only after noting, while reviewing the *Butz* factors, that the Nevada Board performs its duties and functions under a comprehensive umbrella of statutes and that the Nevada Administrative Procedure Act provides adequate safeguards comparable to those available under federal law); *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62, 66 (5th Cir. 1997) (holding that the Medical Board and its Director were immune only after finding that at least five of the six *Butz* factors were sufficiently satisfied including a determination that the Mississippi statutes contained a multitude of safeguards reducing the need for private damage claims).

A careful review of Petitioner's responsibilities under New York's PHL, in conjunction with the factors outlined by this Court in *Butz*, clearly indicate that Petitioner's responsibilities under the summary suspension procedures do not share enough of the characteristics of the judicial process to afford her absolute immunity.

A. Petitioner's Role in the Summary Suspension Procedure of PHL § 230(12) Only Entitles Petitioner to Qualified Immunity Under *Butz*

The Petitioner functions as neither "prosecutor" nor "judge" in the summary suspension proceeding. The function of prosecutor is filled by the director of the OPMC of the Board for Professional Medical Conduct ("BPMC") and attorneys working for OPMC. PHL § 230(10)(a).

Investigations of physician discipline cases are conducted by OPMC staff. PHL § 230(10)(a). The results of investigations are referred to an investigative committee ("IC") of the BPMC. *See* PHL § 230(10)(a)(iv). Hence, it is the OPMC director, members of the IC and their counsel who have the "special function" of prosecutors in initiating and prosecuting charges, as identified in *Butz*. 438 U.S. at 508.

Once charges are initiated, a Hearing Committee ("HC") of the BPMC is convened to consider the charges and evidence in support of same. Proceedings of the HC are conducted before a hearing officer (who shall be an) attorney, with authority to rule on objections, motions, privileges and the like. Hence, it is the members of the HC and the hearing officer who occupy the role(s) of judge of the proceedings, the "special function" entitled by *Butz* to absolute immunity.

The *Butz* Court held that absolute immunity **only** applied to the limited class of persons acting in the function of prosecutor, judge or counsel. All other executive branch officials exercising discretion are entitled to only qualified immunity.

> This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer*, the need to protect officials who are required to exercise their discretion and the related public interest in

> encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

Butz, 438 U.S. at 506-07.

In *Butz*, the Supreme Court distinguished between the discretionary function of a senior agency official who must often act swiftly and on the basis of factual information supplied by others from the "special function" of other defendants who acted as prosecutors, judges or counsel. The *Butz* Court reserved absolute immunity as only applicable to the narrow class of those "special functions". For other senior executive officials in both the state and federal government, the protections afforded by qualified "good faith" immunity were deemed sufficient.

In the instant case Petitioner did not act as prosecutor - -she did not frame legal charges, present the evidence or sit on the IC. Moreover, she was not a member of the Medical Board or the HC, nor was she the hearing officer involved in Respondent's disciplinary hearings. It is not believed that she even attended any of those proceedings. Rather, Petitioner issued a summary suspension based upon her "opinion" that Respondent posed an imminent danger to public health and deserved to be summarily suspended. PHL § 230(12). It is

alleged that Petitioner exercised her discretion in blatant disregard of even the minimal due process protections to be afforded under the summary suspension procedures of the PHL which embody constitutional due process principals. It is also alleged that Petitioner's misconduct during the early stages of the investigation, prior to a finding of probable cause, transgressed clearly established constitutional rules of due process embodied in various PHL statutory requirements including the right to notice, opportunity to be heard, right to counsel, right to exculpatory evidence and the right to equal treatment in good faith. Accordingly, in exercising her discretionary executive function, Petitioner is only entitled to qualified and not absolute immunity.

B. Summary Suspension Proceedings are not Sufficiently Similar to a Judicial Proceeding to Warrant Absolute Immunity Under *Butz*

The summary suspension provisions set forth in PHL § 230(12) are not sufficiently similar to a judicial proceeding to warrant absolute immunity. Although a few circuits have extended absolute immunity to state officials who impose summary suspensions in medical disciplinary proceedings, it is not their status as a state official which tips the determination of absolute immunity in their favor. Instead, each circuit carefully reviews the *Butz* factors, as did the Second Circuit in the instant matter, paying particular attention and affording the appropriate weight to the regulatory framework in place to control unconstitutional conduct under that particular state's statutory scheme. *See Watts v. Burkhart,* 978 F.2d 269, 275-76 (6th Cir. 1992) (providing absolute immunity only for the professionals who are members of Tennessee Board of Medical Examiners and only after finding that the Tennessee Administrative Procedures Act provides procedural safeguards comparable to

those provided by corresponding federal law, all of these safeguards are applicable to medical license revocation proceedings, the pertinent section of the Tennessee code governing summary suspensions "scrupulously protects" the fundamental right of notice and opportunity to be heard including an **in person** hearing with the licensee present, notice of charges and right to counsel; and that under the procedures for summary suspension the committee must incorporate a finding in its order indicating the public health, safety or welfare imperatively requires emergency action); *Dunham v. Wadley,* 195 F.3d 1007, 1010-11 (8th Cir. 1999) (case not involving summary suspension, granted immunity only to members of State Board of Veterinary Medical Examiners and only after concluding that sufficient safeguards exist in the Arkansas regulatory framework to control unconstitutional conduct and that under the relevant portions of the Arkansas Code the board was empowered to conduct investigations, hold hearings, administer oaths, receive evidence, issue subpoenas, make factual determinations and enter orders consistent with the findings thus weighing towards a decision that the duties of the board were functionally comparable to the duties performed by courts); *Horwitz v. State Bd. of Medical Examiners of State of Colo.*, 822 F.2d 1508 (10th Cir. 1987) (providing absolute immunity only for Medical Board members and only upon finding that there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct before it can be determined that an administrative official performs functions analogous to those of judges and prosecutors and should be granted absolute immunity).

In another case before the Tenth Circuit, *Moore v. Gunnison Valley Hospital,* absolute immunity was **denied** to the peer review committee that temporarily suspended a doctor from practicing medicine at the hospital. 310 F.3d 1315, 1316 (10th Cir. 2002). A review of the *Butz* factors led the court to determine, as did the Second Circuit in the instant

matter, that no procedural protections were available to the physician, that the members of the committee lacked the independence typical of a judicial body, there appeared to be nothing in the record indicating that prior decisions were utilized as precedent by the committee, or that the physician was able to challenge those actions before they became effective. *Id.* at 1317-18. Thus, the Tenth Circuit concluded that the peer review process utilized to summarily suspend a physician's license lacked the significant characteristics of a judicial body entitled to absolute immunity.

In the instant case the Second Circuit found that four of the *Butz* factors weighed against granting absolute immunity to Petitioner. These four factors include: (1) the total absence of safeguards in the summary suspension procedures; (2) the summary suspension process was not adversarial; (3) the decision is not truly correctable on appeal; and (4) there was no indication that the commissioner relied upon any legal precedent in making the decision. The two remaining *Butz* factors found to weigh in favor of absolute immunity include the court's assumption that the commissioner is not removable at will and is insulated from political influence; and that the suspension of a physician's license pursuant to § 230 is likely to stimulate a litigious reaction. (App. 11a).

(i) No Procedural Safeguards are Present in the Summary Suspension Process

As recognized in *Butz*, procedural safeguards must be in place to protect against unconstitutional conduct. However, the evidentiary standard in the summary suspension procedure at issue in this action cannot be called a safeguard to protect against unconstitutional conduct. According to § 230(12)(a) no evidentiary finding is required by the investigative committee, "only a determination that the licensee is causing, engaging in, or maintaining a condition or

activity which in the commissioner's **opinion** constitutes an imminent danger to the health of the people." PHL § 230(12)(a) (emphasis added). Based on a plain reading of the statute, the statute empowers the commissioner to summarily suspend a physician's license based solely on her opinion. Although the statute requires a recommendation by an investigative committee, the commissioner is not obligated to follow any such recommendation. *See id.* Furthermore, the statute contains none of the procedural safeguards necessary to protect against the very kind of overreaching by an overzealous commissioner as occurred in this case.

In *DeRosa v. Bell*, a case in which the facts and legal reasoning are strikingly similar to the instant matter, the court found that during the summary suspension phase of the plaintiff's day care license, the plaintiff was not entitled to any of the safeguard features found in a judicial proceeding. 24 F.Supp.2d 252, 257 (D. Conn. 1998). The district court rejected the notion that the commissioner of health had just one function and was entitled to quasi-judicial absolute immunity. *Id.* at 256. The court's rationale was based upon the fact that during the summary suspension stage, the plaintiff was not entitled to any of the safeguard features that make the hearing stage similar to a judicial proceeding. *Id.*

Although the *DeRosa* defendants likened the summary suspension process to a judge issuing an *ex parte* temporary restraining order, the district court found this to be a flawed analogy and determined that "the materials on which the decision were based were not brought before the Commissioner by an independent party seeking an adjudication, but rather by her own staff, who received the information through an interagency information sharing agreement." *Id.* at 257. Moreover, the court noted that simply because an official makes a decision based on information brought before them, "this does not transform an executive action into a judicial action." *Id.* The court found "[t]he *ex parte* TRO . . . a particularly misleading example

because it is one of the few judicial actions that is not subjected to the rigors of adversary process." *Id.*

As in *De Rosa*, the Petitioner based her "opinion" on information received from her own agency, not from information brought before her by an independent party. Also, as in *De Rosa*, Petitioner cannot squeeze into the cloak of quasi-judicial absolute immunity. The ease with which Petitioner denied Dr. DiBlasio the minimal due process protections contained in the summary suspension procedures demonstrates that the procedures are patently insufficient and do not safeguard a physician from unconstitutional conduct.

After careful consideration and analysis the Second Circuit found that "although [§ 230] provides some protection to physicians subjected to summary suspension proceedings, the efficacy of those procedures are seriously diminished by other features of § 230." (App. 12a). The court noted that the hearing committee could only suggest a course of action while the commissioner retained final authority to summarily suspend a physician's license; although the hearing committee must initiate a suspension, "the independence of that body is severely undermined by the commissioner's appointment and removal power;" and, most importantly, that "the post-deprivation hearing before the Board's hearing committee provides no real check on the commissioner's conduct because, under the statute, and as happened here, the commissioner is free to reject the hearing committee's recommendation that the suspension be lifted." (App. 12a - 13a). The commissioner was considered to have "unfettered authority" in the summary suspension process and "[t]he absence of meaningful safeguards against arbitrary executive action" in the summary proceedings weighed against a finding of absolute immunity. (App. 13a).

The Second Circuit summarized its opinion concerning New York State's procedures governing summary suspension by stating that the procedures "lack the hallmarks and safeguards of a judicial proceeding that would render

absolute immunity for those officials involved appropriate." (App. 14a). The court, specifically noting that several circuits have granted judicial immunity to medical board examiners in license suspension proceedings, points out the differences in suspension procedures from state to state and that the procedures at issue in those cases generally provide greater protection from erroneous deprivation than that found under the PHL. (App. 14a, n.2).

(ii) The Summary Suspension Procedures Lack Due Process Protection of the Adversary Process

The commissioner may suspend a physician if, in her opinion, he poses an imminent danger to the public. This is an *ex parte* procedure wherein the physician does not have the right to advance notice, the right to counsel before the investigative committee, or the right to have the opportunity to give a competing version of the relevant facts and events. In other words, the summary suspension process requires no active participation or "adversarial" procedures. When reviewing the procedures afforded a physician under § 230, the Second Circuit correctly found that the procedures were not adversarial in nature and this weighs against absolute immunity under *Butz*. The Court found that although physicians are permitted to have an attorney present during the interview and to present countervailing evidence at the interview stage (both protections which were notably denied to Dr. DiBlasio), the interview lacks the key elements of an adversarial proceeding, such as a neutral decision maker and evidentiary rules. (App. 14a).

(iii) Erroneous Summary Suspensions Are Not Correctable on Appeal

PHL § 230 allows a physician to challenge a summary suspension prior to ultimate resolution of all charges. However, even if the committee on professional conduct agrees that the suspension should be lifted or modified the commissioner is free to reject this finding and continue the suspension, without making any findings or satisfying any legal requirements. As noted by the Second Circuit, the post-summary suspension hearing available under § 230, provides only an avenue for a review of the charges not a meaningful review of the summary suspension "because, as happened here, the commissioner is free to ignore the hearing committee's recommendation." (App. 13a). Moreover, the administrative review board, created specifically for the purpose of reviewing determinations of the committee on professional conduct, does not have the power to review the commissioner's summary suspension order. *See* § 230-c. It is also apparent that after the summary suspension and Petitioner's attendant press conferences and widespread media coverage throughout the New York area, the damage to Dr. DiBlasio's reputation was a *fait accompli* and not truly "correctable" upon appeal.

(iv) The Summary Suspension Procedure Does Not Rely Upon Legal Precedent

There is no indication in the record that the commissioner relied upon any legal precedent in making the summary suspension determination and there is no requirement, standard or procedure in the summary suspension process for the commissioner to do so. Where there is no evidence in the statute that legal precedence should be applied and no evidence from the record that the commissioner did apply legal precedent in this case, the only

conclusion to be drawn from this record and, the conclusion indeed drawn by the Second Circuit was that legal precedent played no role in the summary suspension of Dr. DiBlasio. (App. 14a). This conclusion is not in tension with the holdings of other circuits. Although it may not be found to be a controlling factor by some circuits, and there is no indication that the Second Circuit held it to be a controlling factor, it is a factor to be weighed in the *Butz* analysis. (App. 14a). This factor weighs against absolute immunity.

(v) No Insulation from Political Influence

If anything, the Second Circuit was generous to Petitioner in accepting the claim that Petitioner, a political appointee serving an elected governor, is "insulated from political influence." Although the commissioner is appointed by the governor and may hold the office until the end of the governor's term, *see* PHL §204(1), the commissioner is not insulated from external political influences. If the governor seeks a second term, the governor is free to appoint a new commissioner if he is displeased with the political implications of Petitioner's conduct or job performance. Indeed, Petitioner's conduct in seeking the summary suspension of two allegedly corrupt and negligent physicians in a high-profile media case involving a politically important demographic group, demonstrates that Petitioner placed herself in a better position to advance her own political interests and gain favor with the official who appointed her. Indeed, based upon the frenzy of resulting media coverage and phone banks being deluged by thousands of women, many of whom were never patients of Respondent or Bier, P.C., Petitioner's false and damaging disclosures during press conferences, allegedly held only to announce the summary suspension, made for attractive publicity for Petitioner as a self-proclaimed "public champion."

The *Butz* Court expressed the historical concern about the lack of independent judgment exercised by hearing examiners prior to the Administrative Procedure Act. The Butz court looked at several criteria to determine whether a public official was "insulated from political influence." *See Butz,* 438 U.S. at 513. Criteria identified by the *Butz* Court included (1) that officials should not be allowed to perform prosecutorial and investigative functions as well as their judicial functions, (strikingly similar to the concerns at issue in this case wherein the Petitioner held various roles and donned both "investigative" and "executive-decision maker" hats); (2) that officials may not perform duties inconsistent with their duties as hearing examiners, (such as happened in the instant matter wherein, as noted by the Second Circuit, Petitioner involved herself in the investigation, and then later was the final arbiter of the decision to impose and sustain the summary suspension (App. 16)); and (3) that the official be precluded from consulting any person or party, including other agency officials, concerning a fact at issue in the hearing (such as here where Petitioner's expression of "tremendous interest" in the outcome of the investigation was communicated to the sole medical investigation resulting in admitted biased). *Butz,* 438 U.S. 513-14. These characteristics are not indicative of a "neutral and detached" officer and thus weigh against absolute immunity. *Watts,* 978 F.2d at 276.

After a careful weighing of the *Butz* factors it can only be determined that absolute immunity cannot be extended to the commissioner in this matter - - the commissioner's role in the summary suspension process does not share the characteristics of the judicial process. Indeed, five of the six *Butz* factors are notably absent in this case.

Moreover, the decision of the Second Circuit does not conflict with the rulings of this Court and other courts of appeal. As dictated by this Court, absolute immunity is only accorded to officials of governmental agencies who perform

certain functions analogous to those of a judge. *Butz*, 438 U.S. at 515. The Second Circuit scrupulously employed the functional test outlined by this Court in *Butz* and determined that the commissioner's functions did not share enough of the characteristics of a judicial function to warrant absolute immunity. This decision is not in direct conflict with the Sixth, Eighth or Tenth Circuits. Each of these Circuits also applied the *Butz* factors to the facts before them and, after analyzing the relevant statutes, found that the statutes provide adequate procedural safeguards to protect physicians against unconstitutional conduct. The difference between the Second Circuit's decision and the decisions of the other circuits is a result of the different statutes under review and the role of defendants in each case. New York's PHL does not provide the procedural safeguards which are the hallmarks of a judicial proceeding and, thus, absolute immunity is not appropriate. (App. 14a). Moreover, Petitioner's role is not analogous to a judge or a prosecutor, hence she is not entitled to absolute immunity.

C. Appropriate Weight was Given to the Availability of a Prompt, Post-Suspension Hearing

The Second Circuit gives appropriate weight to the availability of a post-suspension hearing in its analysis of the summary suspension procedure under PHL § 230. The court carefully analyzed the summary suspension procedure and found that the hearing available under § 230 only provides for a review of the charges levied against a physician, not a review of the actual summary suspension. (App. 13a). The commissioner is free to completely ignore any post-suspension recommendation made by the hearing committee. The Second Circuit's conclusion was made only after a careful review of the *Butz* factors and after noting the absence of meaningful safeguards against arbitrary executive action.

(App. 13a - 14a).

The Second Circuit, while referring to *Young v. Selsky*, correctly noted that "Article 78 proceedings are generally not considered adequate avenues for 'appeal.'" (App. 14a). In *Young,* an inmate brought civil rights actions against, *inter alia,* the Director of Office of Special Housing and Inmate Disciplinary Programs for New York State Department of Correctional Services. Upon finding that the director was not entitled to absolute immunity based on facts similar to the facts before the Second Circuit in the instant matter, *i.e.*, lack of sufficient guarantee of director's independence and insulation from others in the department, the Second Circuit also noted that the type of injury alleged by plaintiff in *Young* may not be adequately correctable on appeal. *Id.* at 54. The same is true for this action. Without adequate safeguards in place to protect against unconstitutional conduct, a commissioner is allowed to summarily suspend a physician without probable cause and publicly make false accusations to irreparably harm the physician's reputation - - this damage to reputation cannot be corrected on appeal.

At first blush it appears as though the decision of this Court in *Barry v. Barchi,* 443 U.S. 55 (1977) supports Petitioner's contention that it is consistent with due process for the State to be entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues. (Petitioner's Memorandum of Law ("Petitioner's Mem."), at p.19). However, according to *Barry*, it is a necessary prerequisite of any summary suspension proceeding that probable cause be satisfactorily established. *See id.* at 64. Under the summary suspension statute currently before this Court, no probable cause was established prior to the suspension, rather it was based only upon the Commissioner's "opinion."

Under certain circumstances this Court has found that protecting the public from imminent danger justifies

summary administrative action. *See Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 301-02 (1981). However, before summary administrative action could be justified the *Hodel* Court noted that the "criteria established" by the act had to be "specific enough to control government action and reduce the risk of erroneous deprivation." *Id.* The statute at issue in *Hodel* defined the threat of imminent danger, unlike the § 230(12) of the PHL which only defines "imminent danger" in terms of what those words mean in the opinion of the commissioner. *Id.* at 301.

Petitioner cannot be allowed to rely upon procedural safeguards which are only provided **after** a physician's license has been summarily suspended but before probable cause is established. (Petitioner's Mem., at pp.19-20). These safeguards under § 230 are only relevant to the hearing which occurred **after** the decision to summarily suspend Dr. DiBlasio was made. None of these safeguards are in place to protect a physician before a summary suspension is ordered. None of the procedures give anyone other than Petitioner the authority to modify or vacate a summary suspension order so long as the case remains pending. Instead, the commissioner may summarily suspend a physician's license without the presence of any meaningful safeguards.

D. The Second Circuit Correctly Held That The Commissioner's Role is Not Sufficiently Analogous to That of a Judge

The decision of the court below specifically notes that besides the commissioner's ultimate authority to summarily suspend a license, the commissioner's functions otherwise do not resemble that of a judge. (App. 15a). The court refers to the multiple hats worn by the commissioner in the course of the summary proceeding where she is the "overseer of the investigation, initiator of charges and summary proceedings, and final arbiter of the decision to impose and sustain the

summary suspension of a physician's license." (App. 16a). It was the blending of the investigatory, prosecutorial and judicial roles that led the court to determine that "§ 230 unduly risks compromising the independence and neutrality of the commissioner's judgment, and abrogating the checking function achieved in the judicial system." (App. 16a).

The Second Circuit's conclusion that the unacceptable blending fostered under § 230 is in line with the prior holding of this Court in *Withrow v. Larkin*, 421 U.S. 35, 54 (1975). In *Withrow,* where the issue of a dual role was raised, this Court found no evidence of bias or the risk of bias or prejudgment based on the processes utilized by the board. The Court also cautioned, however, that although a combination of investigative and adjudicative functions does not necessarily constitute a due process violation, a court is not precluded from determining from the facts before it that the risk of unfairness is intolerably high. *Id.* at 58. That is what the Second Circuit repeatedly found in the facts before it - - the actions of the commissioner under the PHL were arbitrary and provided no meaningful safeguards. (App. 13a). Section 230 was found to unduly compromise the commissioner's neutrality and the independence of her judgment. (App. 16a).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO,
in her individual and official capacity,

Petitioner,

v.

MARIO DIBLASIO, M.D. and MARIO DIBLASIO, M.D., P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

NEW YORK'S PROCEDURE GOVERNING SUMMARY SUSPENSION OF PHYSICIANS IS SIMILAR TO PROCEDURES WHICH HAVE BEEN HELD BY THE SIXTH, EIGHTH, AND TENTH CIRCUITS TO WARRANT ABSOLUTE IMMUNITY

Unlike the Second Circuit, the Sixth, Eighth and Tenth Circuits, respectively, have found the statutory protections governing summary suspensions in Tennessee, Arkansas, and Colorado sufficiently protective of physicians' rights to warrant extension of absolute immunity to non-judicial decision-makers. See *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 1992); *Dunham v. Wadley*, 195 F.3d 1007 (8th Cir. 1999), *cert. denied*, 531 U.S. 819 (2000); *Horwitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir.), *cert. denied*, 484 U.S. 964 (1987).

Contrary to respondent's contentions, *see* Respondent's Brief in Opposition ("Br. in Opp.") at 17-29, there is no material difference between New York's summary suspension statute, Public Health Law ("PHL") § 230(12), and the equivalent statutes of Tennessee, Arkansas, and Colorado. New York affords functionally identical, if not greater, protections to physicians than do these other three states. As detailed below, these protections include the opportunity to be interviewed with counsel present prior to any suspension; the requirement that the decision-maker in a summary suspension action (in New York, the Commissioner) find probable cause for a suspension at the behest of other medical experts and find that a physician's actions constitute an imminent danger to the public health; and the correctability of a suspension. The Second

Circuit's decision thus conflicts with the decisions of its sister circuits, meriting a grant of certiorari by this Court.[1]

A. Pre-Suspension Interviews

PHL § 230(10)(a)(iii) requires that the Board must conduct a pre-suspension interview with the physician, at which the physician may have counsel present and may submit written comments or expert opinion. At this interview, the physician under investigation has the opportunity to provide an explanation of the issues under investigation. By comparison, the summary procedures at issue in Tennessee, Arkansas, and Colorado do not provide this significant safeguard. *See* Tenn. Code Ann. § 4-5-320(d)(1)(B); Ark. Code Ann. §§ 17-101-203, 25-15-211; Colo. R. Stat. § 24-4-104(4).

B. The Commissioner Does Not Have "Unfettered Discretion" to Issue A Summary Suspension

Contrary to respondent's contentions, *see* Br. in Opp. at 5-6, PHL § 230(12)(a) does not afford the Commissioner "unfettered discretion" in determining whether a summary suspension is warranted. Rather, as the Second Circuit recognized, the Commissioner has authority to summarily suspend a physician's license only after "an investigation and a recommendation by a committee on professional conduct," which must include two physicians. Pet. App. at 18a; *see also* PHL §§ 203, 230(6). Before an investigative committee may even recommend a suspension to the commissioner, it

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1. While respondent focuses on alleged errors by the Commissioner, any such conduct is irrelevant here. "If judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error.'" *Mireles v. Waco*, 502 U.S. 9, 12-13 (1991) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)).

must consult with a medical expert. *See* PHL § 230(10)(a)(ii). These requirements are functionally equivalent to the procedures required by Tennessee and Colorado, where summary action may be taken by a panel comprised largely of physicians. *See Watts*, 978 F.2d at 275; *Horwitz*, 822 F.2d at 1511; *see also Dunham*, 195 F.3d at 1010 (veterinary medical examining board comprised of four veterinarians and one citizen).[2]

In requiring a predicate determination that the physician's practices are an "imminent danger" to the public, New York's law further cabins the Commissioner's discretion in a manner that mirrors the standards applied by Tennessee, Arkansas, and Colorado. *See Watts*, 978 F.2d at 276 (Tennessee law authorizes suspension prior to notice and hearing where board finds "that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order"); *Horwitz*, 822 F.2d at 1512 (Colorado law authorizes summary suspension without prior notice or a hearing, "when the Board has reasonable grounds to believe that the public health, safety, or welfare is endangered and the board finds that emergency action is required"); *see also* Ark. Code Ann. § 25-15-211(c) (summary suspension authorized "[i]f the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order").[3]

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2. New York's procedures also insure that probable cause is established before the Commissioner takes summary action. *See Barry v. Barchi*, 443 U.S. 55, 65 (1979). ("At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements.")

3. Respondent's related assertion that New York's statute provides "no procedural safeguards" because it does not require "an evidentiary finding," Br. in Opp. at 19, is misplaced. There is no such requirement in the context of interim action such as a summary suspension. (Cont'd)

C. Correctability On Appeal

Respondent's assertion that only the Commissioner could modify or vacate her own summary suspension order, see Br. in Opp. at 28, is erroneous. Any errors in respondent's summary suspension were immediately and adequately correctable on appeal. Respondent fails to acknowledge that, from the outset, he could have challenged his summary suspension in a state court proceeding on the grounds that the Commissioner's order was "in violation of lawful procedure," "affected by error of law," "arbitrary and capricious," or "an abuse of discretion." CPLR § 7803. Respondent also was entitled to raise state court claims that his adjudicator "was biased and prejudiced the outcome" or engaged in improper ex parte communications. *Locurto v. Safir*, 264 F.3d 154, 174-75 (2d Cir. 2001). In addition, respondent was entitled to an expedited disciplinary hearing commencing within ten days of his summary suspension, *see* PHL § 230(12)(a), but he fails to acknowledge that he agreed to adjourn his hearing and continue his suspension until the conclusion of his disciplinary hearing.

Respondent also declines to mention that he eventually brought a state court proceeding alleging that the health commissioner was biased and that his suspension was unfounded. The state court, after granting respondent temporary partial relief, ultimately upheld the commissioner's determination to continue the full suspension, finding that it "did not appear to be arbitrary and capricious but rather was based upon the totality of the facts before her." Pet. App. at 33a. The very next day the hearing committee dismissed the charges

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(Cont'd)

See Maryland v. Pringle, 124 S.Ct. 795, 800 (2003) ("finely tuned" evidentiary standards "have no place" in the probable cause decision (quotation omitted)).

and terminated the suspension. *Id.* Consequently, respondent clearly had procedural redress to "correct" his "erroneous" suspension, and in fact utilized those procedures.

While the Second Circuit discounted the value of immediate judicial review of the interim suspension and a prompt post-suspension hearing, *see id.* at 14a, the Tenth Circuit found similar provisions in Tennessee's statutory framework to be sufficient for purposes of mitigating "[a]ny danger of improper use of the board's summary powers." *Watts*, 978 F.2d at 276.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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